HUC

R

UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

http://www.archive.org/details/treatiseonpleadi01honniala

A TREATISE

ON

PLEADING AND PRACTICE

IN COURTS OF RECORD IN

CIVIL CASES IN THE STATE OF OKLAHOMA

WITH FORMS

BY ARTHUR B. HONNOLD

OF THE OKLAHOMA BAR

AUTHOR OF A TREATISE ON OKLAHOMA JUSTICE PRACTICE, AND A TREATISE ON WORKMEN'S COMPENSATION, FORMERLY A MEMBER OF THE EDITORIAL STAFF OF THE WEST PUBLISHING COMPANY

IN THREE VOLUMES

VOLUME I

KANSAS CITY, MO.
VERNON LAW BOOK COMPANY
1922

T
H759lp
1922
v.1

COPYRIGHT, 1922
BY
VERNON LAW BOOK COMPANY

(HON.PL.& PRAC.)

Exchange
4-8-65
GP

ha 5-21-65

PREFACE

THOUGH Oklahoma is one of the newest states, the Code of Civil Practice adopted from Kansas and the changes made since its adoption in the Territory have been so thoroughly tried out and so frequently construed by the highest courts in clear, analytical opinions that a comprehensive work on procedure and practice can now be written, based on controlling authorities.

Such a work is here attempted. Every statute relating in any way to procedure is quoted in full in connection with the treatment of the subject to which the statute relates. Every Kansas and Oklahoma case containing any discussion of procedural matters has been examined and the law gleaned therefrom, in so far as it is applicable to the practice in Oklahoma at the present time. A studious effort has been made to eliminate all decisions which are now inapplicable, or which have been reversed or overruled.

Although the Code of Civil Procedure was adopted with a view of simplifying and stabilizing the rules of procedure, all of these rules, with their numerous qualifications and applications, cannot be said to be incorporated in the statute as adopted by the Legislature. Volumes have been written around a single clause or section of the Constitution of the United States; likewise, pages, if not volumes, could well be written around each of various sections of the Code—all being based upon decisions throwing light upon the construction and application of the Code provisions.

In the year 1850, Mr. Justice Selden, of the Supreme Court of New York, said: "Many of the technical rules of the common-law system of pleading may well have been considered as originating in, and connected with, those distinctions between the different forms of action which were peculiar to that law. There are, however, some of those rules which are so well adapted to accomplish the end of all pleading that I should find it difficult to persuade myself that the Legislature could have intended to abrogate them."

The evil of the common-law system of pleading, depending upon a system of rules necessarily artificial and complex, in consequence of

which, either through ignorance or mistake, an issue would be formed not involving the real merits of the controversy, and a decision be produced contrary to justice and equity, was originally sought to be remedied by allowing the widest scope in the proof of facts not strictly in issue. This remedy has been repudiated by the Code, and this evil remedied in large part by the liberal allowance of amendments.

The Code abolishes the distinctions between actions at law and suits in equity, and the course of proceeding in both cases is now the same. Whether the action depends upon legal or upon equitable principles, it still remains a civil action, to be commenced and prosecuted without reference to this distinction. Although this is true in reference to the form and course of proceeding in the action, the principles determinative of the rights of the parties remain unchanged.

The more liberal view of the Code is that it is based upon an entirely new theory, with different ends to accomplish, and that it is better, in order to carry out its spirit, to consider it as a new theory, to be construed and carried into effect upon principles peculiar to itself.

If the attorneys of to-day were first made familiar with the rules of common-law pleading as they existed in the early part of the last century, it would be well to adopt this view; but so many rules, many of which grew out of the old rules, have been built up around the provisions of the Code, in such way as to become in effect a part thereof, that the question whether these rules are the same as those existing at common law is of minor importance. In other words, it is generally enough to know that, ever since the adoption of the Code, we have been borrowing from the common law to supplement and clarify the Code; but the extent to which we have borrowed is not of any great importance, since the majority are more familiar with these rules than with the original rules of the common law. However, familiarity with the common-law rights of action is important. Mr. Justice Burwell, of the Supreme Court of the Territory of Oklahoma, well said that, "while the forms of actions have been changed, we must not forget that the right of any particular action, as it existed at common law, remains the same, unless abridged or denied by the statute; and, while the common-law forms of action have been abolished, the rights of such actions continue to exist, but under a different name. Every cause of action that existed under the common-law forms, which has not been abolished, still exists under the name of a 'civil action.' The statute did not abolish common-law causes of action; it only abolished their forms and grouped them under one head."

This work may be said to contain two indexes; one the table of contents at the beginning of the work, and the other the index proper at the close. It also contains a table of statutes and constitutional provisions, showing the section of the work in which each such statute or provision is cited. It also contains a table of cases, in which are arranged in alphabetical order all of the several thousand cases cited.

The arrangement and general form of the work is the result of several years' experience, and, if it is found to be logical and workable, the lawyer should be able, with the other aids above mentioned, to find in these volumes what he wants, with a minimum of effort, provided it is within the scope of the work.

A sample of every form suggested by the text, or the statutes quoted, is contained in these volumes, and it is hoped that they will be of aid, at least, in the preparation and the checking of forms prepared by the lawyer.

I desire to acknowledge an indebtedness for valuable assistance given by my law partner, Mr. Herbert D. Mason, and also by the following attorneys: Mr. Kenneth Lawing, who assisted in the preparation of the entire work; Mr. L. G. Williams, who assisted in the preparation of the forms; Mr. Roscoe E. Harper, Professor of Law of the Oklahoma University, who assisted on the chapter on Appeal and Review, and Mr. Elton B. Hunt, who assisted in the portion of the work relative to certain special proceedings and special writs.

ARTHUR B. HONNOLD.

TULSA, OKLAHOMA, January 2, 1922.

TABLE OF CONTENTS

VOLUMES I TO III

VOLUME I

CHAPTER I

COURTS AND COURT OFFICERS

Sections

1–142. Article I.—Courts and judges.

1–31. Division I.—Relating to code practice in general.

32–45. Division II.—Judges in general.

46–81. Division III.—District courts and judges.

82–89. Division IV.—Superior courts and judges.

90–113. Division V.—County courts and judges.

114–142. Division VI.—Supreme Court and judges.

143–198. Article II.—Other court officers.

143–145. Division I.—In general.

146–162. Division II.—Court clerks.

163–172. Division III.—Sheriffs and other peace officers.

173–198. Division IV.—Attorneys.

ARTICLE I

COURTS AND JUDGES

DIVISION I.—RELATING TO CODE PRACTICE IN GENERAL

1. Courts open for administration of justice.

2. Due process.

3. Judicial power vested where.

4. Judges—Conservators of the peace.

5. Title of chapter.

6. Prior decisions and precedents—Stare decisis.

7. Decisions of federal courts.

8. Common law.

9. Obiter dictum.

10. Law of the case.

11. Statutes and construction.

12. Erroneous words and punctuation.

13. Rule of ejusdem generis.

14. Statute construed as a whole.

15. Statutes construed together or in the light of each other.

Sections
16. Administrative construction.
17. Provisos or exceptions.
18. Statute adopted from another state.
19. Adjournment by sheriff.
20. Publications.
21. Affirmation.
22. Computation of time.
23. Surety—Justification.
24. Qualifications.
25. Real estate mortgage as bond.
26. Valuation of real estate.
27. False valuation—Penalty.
28. Action on bond.
29. Several actions on security.
30. Submission of controversy.
31. Impeachment and removal from office.

DIVISION II.—JUDGES IN GENERAL

32. As public officer.
33. Judge pro tempore.
34. Waiver of objections.
35. Powers of special judges.
36. Liabilities.
37. Change of judge.
38. Disqualifications.
39. Relationship.
40. Bias and prejudice.
41. Objections and procedure.
42. Form—Application for disqualification of judge.
43. Waiver of disqualifications.
44. Acts of disqualified judge.
45. Powers at chambers.

DIVISION III.—DISTRICT COURTS AND JUDGES

46. District court—Where held.
47. Districts and judges.
48. Sessions—Time for—Adjournments.
49. Change of district—Disposition of cases pending.
50. Special terms.
51. Adjournment of term.
52. Two or more judges sitting at same time.
53. Additional judge.
54. District judges—Expenses.
55. Reporter—Appointment—Qualifications.
56. Duties of court reporter.
57. Salary and fees.
58. Traveling expenses.
59. Tenure and oath of office.
60. Notes filed—Admissibility in evidence—Transcripts.
61. Appeal to district court.
62. Party in default.
63. Who may appeal.

Sections
64. When appeal must be taken.
65. Appeal how taken.
66. Appeal bond.
67. Stay of execution.
68. Commitment—How stayed.
69. Justification of sureties—Increased bond.
70. Appeal bond form—Action upon.
71. Appeal not to stay issue of letters.
72. Appeal not to stay order revoking letters, etc.
73. Proceedings.
74. Powers of the appellate court.
75. Trial de novo.
76. Penalty for neglect of county judge to transmit record.
77. Dismissal of appeal—Effect—Costs.
78. Enforcement of decree.
79. Executor's bond stands in place of appeal bond.
80. Reversal for error not to affect lawful acts.
81. Rules of district court.

DIVISION IV.—SUPERIOR COURTS AND JUDGES

82. Superior courts in general.
83. Qualifications of judges—Term of office.
84. Election.
85. Procedure—Juries—Appeals.
86. Court stenographer.
87. Sheriffs—County attorneys.
88. Judge's salary.
89. Transfer of causes.

DIVISION V.—COUNTY COURTS AND JUDGES

90. Procedure—Seal.
91. Terms of court.
92. Proceedings in vacation—Out of court.
93. Calendar.
94. Stenographer.
95. Duties.
96. Oath and tenure of office.
97. Fees for making transcripts.
98. Ex officio court clerk.
99. Compensation.
100. Fees—Record.
101. Report of.
102. Fees paid to treasurer.
103. Special court towns.
104. Judge—Term of office—Qualification.
105. To give bond.
106. Office and records.
107. Practice prohibited.
108. Temporary county judge.
109. How elected.
110. Fee when affidavit of bias made.
111. County judge—County attorney—Salary.

Sections
112. Court reporters.
113. Rules for county court.

DIVISION VI.—SUPREME COURT AND JUDGES

114. Membership—Quorum—Eligibility—Term of office—Vacancies—Jurisdiction.
115. Justices—Judicial districts—Election—Law clerks.
116. Referees and first law clerk.
117. Chief justice—Election.
118. Vice chief justice—Election.
119. Justices—Not to be candidate for other office.
120. Commencement of term.
121. Sessions—Opinions.
122. Chief justice—Expiration of terms—Election.
123. Clerk.
124. Law governing.
125. Salaries of justices.
126. Effect of invalidity.
127. Jurisdiction—Divisions.
128. Appeals from county court.
129. Appeals from corporation commission.
130. Appeals from state labor commission.
131. Formation of new counties.
132. Speedy hearing.
133. Original jurisdiction—Division of assets and liabilities among counties.
134. Parties—Proceedings.
135. Constitution.
136. Jurisdiction—Removal of state capitol and normal schools.
137. Jury trial when.
138. Trial.
139. Jury—How selected.
140. Costs—Witness fees.
141. Reports.
142. Supreme court rules.

ARTICLE II

OTHER COURT OFFICERS

DIVISION I.—IN GENERAL

143. Compensation.
144. Deputies—Duties.
145. Bailiffs.

DIVISION II.—COURT CLERKS

146. Office—Selection—Eligibility.
147. Official bond—Form.
148. Powers and duties—Contestants.
149. Liabilities.
150. Deputies.
151. Vacancies.
152. Fees and salaries.

Sections
153. Books to be kept.
154. Appearance docket.
155. Indorsements.
156. Execution docket.
157. Judgment docket.
158. Journal.
159. Files.
160. Cases—Court records.
161. Application of statute.
162. Journal entry—Order of sale—Homestead—Insane spouse.

DIVISION III.—SHERIFFS AND OTHER PEACE OFFICERS

163. Sheriffs and deputies.
164. Service of writs and process—Amercement.
165. Substitute for sheriff.
166. Fees and salaries.
167. Power and duty.
168. Liability—Amercement.
169. Official bonds.
170. Acts of deputy.
171. Wrongful attachment.
172. Indemnity bonds.

DIVISION IV.—ATTORNEYS

173. Who permitted to practice—Examinations for admission.
174. Applicants to conform to rules—Fees for admission.
175. Examination—Commission.
176. Qualifications.
177. Persons not permitted to practice.
178. Attorneys from other states—How admitted.
179. Oath upon admission.
180. Foreign attorneys.
181. Duties.
182. Power, duty, and liability.
183. Implied authority—Tender—Compromise—Notice.
184. May receive money for client.
185. Proof of authority to appear.
186. Purchasing property.
187. Lien for services—Extent—Notice.
188. Fees.
189. Enforcement—Compromise without notice.
190. Amount which may be recovered.
191. May not become surety in action in which employed.
192. Lien—Release by giving bond.
193. Suspension of license—Disbarment.
194. Causes.
195. Defenses—Limitations.
196. Proceedings—How commenced.
197. Trial—Judgment.
198. Attorney and client in general.

CHAPTER II

ARBITRATION, COMPROMISE, AND SETTLEMENT

Sections
199–200. Article I.—Arbitration.
201–202. Article II.—Compromise and settlement.

ARTICLE I

ARBITRATION

199. In general.
200. Forms.

ARTICLE II

COMPROMISE AND SETTLEMENT

201. In general.
202. Construction.

CHAPTER III

JURISDICTION

203–216. Article I.—Nature, scope, elements, and exercise.
217–247. Article II.—Original, concurrent, and appellate jurisdiction.

ARTICLE I

NATURE, SCOPE, ELEMENTS, AND EXERCISE

203. Jurisdiction defined.
204. Basis and elements.
205. Original jurisdiction.
206. Scope, extent, and place of exercise.
207. Territorial extent.
208. Where parties reside or may be found.
209. Jurisdiction of subject-matter.
210. Trusts.
211. Consent and waiver.
212. Ancillary jurisdiction.
213. Rule of comity.
214. Shown by record.
215. Determination of jurisdiction.
216. Objections.

ARTICLE II

ORIGINAL, CONCURRENT, AND APPELLATE JURISDICTION

217. Concurrent jurisdiction.
218. Personal injuries.
219. Appeals—From police judges and justices of the peace.
220. From town justice court.
221. From county commissioners.

Sections
222. How taken.
223. State and federal courts.
224. Transfer of causes.
225. Transfer to state courts.
226. County courts—Jurisdiction—Judge pro tempore.
227. Amount involved.
228. Probate jurisdiction—Sessions.
229. Title involved.
230. Bastardy proceedings.
231. Appellate jurisdiction.
232. District courts.
233. Special cases.
234. Amount involved.
235. Appeals from county court.
236. Appeals in probate cases.
237. Indians and Indian lands.
238. Indian lands.
239. Misconduct in office.
240. Taxes and assessments.
241. Public lands.
242. Vested when—Exemption from taxation.
243. Equity.
244. Foreclosure.
245. Superior courts.
246. Supreme Court.
247. Appeals from county court.

CHAPTER IV

VENUE

248–264. Article I.—Where actions brought.
265–273. Article II.—Change of venue.

ARTICLE I

WHERE ACTIONS BROUGHT

248. Where subject located.
249. Subject-matter.
250. Relating to real estate.
251. Land located in more than one county—Specific performance.
252. Where cause arose.
253. Residence of parties.
254. Domestic corporation—Insurance company.
255. Foreign corporations and nonresidents.
256. Process—Foreign corporations.
257. When charter revoked.
258. Actions against guaranty companies.
259. Actions against transportation or transmission companies.
260. Actions against turnpike companies.
261. Action against board of county commissioners.

Sections
262. Divorce and annulment.
263. Other actions.
264. Waiver of right.

ARTICLE II

CHANGE OF VENUE

265. Change of venue.
266. Discretion.
267. Grounds—Disqualification of judge.
268. Local prejudice.
269. Application.
270. Hearing and order.
271. Waiver.
272. Proceedings after change.
273. Form.

CHAPTER V

REMEDIES AND RIGHTS

274–295. Article I.—In general.
296–298. Article II.—Election of remedies.

ARTICLE I

IN GENERAL

274. Remedies.
275. Cumulative remedy.
276. Actions and special proceedings.
277. Distinctions abolished.
278. Determination of character.
279. Common-law actions.
280. Tort and contract.
281. Illegal transactions.
282. Injury without liability.
283. Tenders.
284. Right of action—Warrantee—Costs and expenses.
285. Action on surveyor's bond.
286. Surety against principal.
287. Money received.
288. Conditions precedent—Warranty.
289. Death pending action.
290. Claim against estate.
291. Usury.
292. Claim against municipality.
293. Offer—Demand—Notice.
294. Taxes.
295. Insurance.

ARTICLE II

ELECTION OF REMEDIES

Sections
296. Necessity.
297. Effect.
298. What constitutes.

CHAPTER VI

ABATEMENT, SURVIVAL AND REVIVOR

299–310. Article I.—Survival and abatement.
311–328. Article II.—Revivor.

ARTICLE I

SURVIVAL AND ABATEMENT

299. What actions survive.
300. Death or assignment.
301. Death of plaintiff.
302. Death of defendant.
303. Personal injuries.
304. Action for wrongful death.
305. Who may sue—Amount of recovery.
306. Party in representative capacity—Change.
307. Receiver.
308. Transfer of interest.
309. Where action does not survive.
310. Abatement—Pendency of another action.

ARTICLE II

REVIVOR

311. Where action survives upon death of party.
312. Proceedings.
313. Who may move.
314. Consent or notice.
315. Notice by publication.
316. Death of plaintiff.
317. Death of defendant.
318. Limitation.
319. Amendment to petition.
320. Time of order.
321. Delay to revive.
322. Vacation of order.
323. Objections and waiver.
324. Action dismissed, when.
325. At instance of defendant.
326. Trial.
327. Death after judgment.
328. Revivor of judgment—Forms.

CHAPTER VII

LIMITATIONS

Sections
329–342. Article I.—Purpose, validity, and operation.
343–344. Article II.—Commencement of action.
345–360. Article III.—When statute begins to run.
361–378. Article IV.—Limitation periods.
379–391. Article V.—Suspension and tolling of statute.
392–397. Article VI.—Extension and waiver.
398–400. Article VII.—Contract limitations.

ARTICLE I

PURPOSE, VALIDITY, AND OPERATION

329. Purpose and validity of statutes.
330. What law governs—Foreign laws.
331. Construction and operation.
332. Retroactive operation.
333. Actions already barred.
334. As against state, municipality, or public officers.
335. Will contest.
336. As to defenses in general.
337. As to set-off or counterclaim.
338. Computation of time.
339. Bar absolute—Operation in general.
340. Debt of husband and wife.
341. Replevin.
342. Foreclosure.

ARTICLE II

COMMENCEMENT OF ACTION

343. When action commenced.
344. Amendment.

ARTICLE III

WHEN STATUTE BEGINS TO RUN

345. Accrual of right or defense—In general.
346. Real property.
347. Personal property.
348. Contracts in general.
349. Continuing contracts.
350. Severable contracts and installments.
351. Bonds.
352. Covenants—Mortgage deed.
353. Municipal warrants.
354. Torts.
355. Guaranty.
356. Malfeasance in office.

Sections
357. Statutory liability.
358. Equitable actions.
359. Conditions precedent.
360. Trusts.

ARTICLE IV

LIMITATION PERIODS

361. Application of statutes.
362. Real actions.
363. Other actions.
364. Fraud.
365. Foreign judgment—Bonds, etc.
366. Action for recovery of estate sold by guardian.
367. Liens.
368. Liens against railroads.
369. Actions against notaries.
370. Rejected claim.
371. Vacancy in administration.
372. Action against sureties on bond.
373. Actions for wrongful death.
374. Assessments—Suits to set aside.
375. Demand—Tender.
376. Actions for usurious interest.
377. Tax deed.
378. Nonresident alien landowners.

ARTICLE V

SUSPENSION AND TOLLING OF STATUTE

379. Suspension of statute in general.
380. Disability.
381. Infancy.
382. Person of unsound mind.
383. Suspension of statute by death.
384. Absence or flight.
385. Nonresidence.
386. Concealment.
387. Of person.
388. Return.
389. Fraud or fault.
390. Ignorance, mistake, and duress.
391. Revivor.

ARTICLE VI

EXTENSION AND WAIVER

392. Failure otherwise than on merits.
393. Extension.
394. Acknowledgment.
395. Extension agreement.

Sections
396. Part payment.
397. Waiver of limitations.

ARTICLE VII

CONTRACT LIMITATIONS

398. In general.
399. Insurance policy.
400. Mutual accident and sickness insurance.

CHAPTER VIII

PARTIES

401–406. Article I.—In general.
407–423. Article II.—Plaintiff.
424–436. Article III.—Defendant.
437–439. Article IV.—Intervener.
440–443. Article V.—Defects, objections, and amendments.

ARTICLE I

IN GENERAL

401. Designation of parties.
402. Counties—Dental board.
403. Married women.
404. Joinder—Necessary parties.
405. Where parties numerous.
406. Style.

ARTICLE II

PLAINTIFF

407. Real party in interest.
408. Joinder.
409. New party.
410. Capacity to sue.
411. Corporations.
412. In particular cases.
413. Creditors.
414. Stockholders' suit.
415. Insurance.
416. Taxpayers—Injunction.
417. Assignee and assignor.
418. Persons not personally interested.
419. Guardian.
420. Infants—Wards.
421. Tenants in common.
422. Government and governmental agencies.
423. Action for death.

ARTICLE III

DEFENDANT

Sections
424. Necessary and proper parties defendant.
425. Receiver.
426. Liens.
427. Joinder.
428. Defendants severally liable.
429. Infants.
430. Guardian ad litem
431. Husband and wife.
432. State as defendant.
433. Change of parties and new parties.
434. Substitution—Plaintiff.
435. Disclaimer.
436. Substitution of judgment creditor.

ARTICLE IV

INTERVENER

437. Interplea—Affidavit—Trial.
438. Pleading.
439. Cases outside statute.

ARTICLE V

DEFECTS, OBJECTIONS, AND AMENDMENTS

440. Want of interest or capacity.
441. Nonjoinder.
442. Misjoinder.
443. Amendment.

CHAPTER IX

COMMENCEMENT OF ACTION

444–450. Article I.—Accrual of cause.
451–505. Article II.—Process.
451–460. Division I.—In general.
461–489. Division II.—Service and return.
490–500. Division III.—Service by publication.
501. Division IV.—Exemption from service.
502–505. Division V.—Objections and amendments.
506–511. Article III.—Appearance.

ARTICLE I

ACCRUAL OF CAUSE

444. Definition.
445. How action commenced.
446. Effect—Notice to third persons.

Sections
447. Premature actions.
448. Insurance.
449. Waiver.
450. Cure of defect.

ARTICLE II

PROCESS

Division I.—In General

451. Definition.
452. Style of process.
453. Necessity and use of process.
454. Issuance of summons.
455. To another county.
456. Præcipe—Form.
457. Form and requisites.
458. Indorsements.
459. Alias summons.
460. Abuse of process.

Division II.—Service and Return

461. In general.
462. Indorsement.
463. Acceptance of service and appearance.
464. By whom served.
465. Service on only part of defendants.
466. Effect of judgment.
467. Manner of service.
468. Validity and effect of service.
469. Service out of state.
470. Service on corporation.
471. On foreign corporation.
472. On insurance company.
473. Insurance commissioner.
474. Insurance board.
475. On railroad company and stage line—Agent.
476. Where no agent appointed.
477. Where personal service impossible.
478. Actions against counties.
479. Service on infant.
480. Service on sheriff.
481. On inmates f hospitals for insane.
482. Notice or process issued by state board of arbitration.
483. County court.
484. Return.
485. Fees.
486. Conclusiveness.
487. Entering return.
488. Evidence of service.
489. Forms.

DIVISION III.—SERVICE BY PUBLICATION

Sections
490. In general.
491. Service by publication—When authorized.
492. In what actions authorized.
493. On whom authorized.
494. Unknown heirs or devisees.
495. Affidavit—Forms.
496. Divorce.
497. Order.
498. Publication notice—Form.
499. Mailing with petition.
500. Proof of publication.

DIVISION IV.—EXEMPTION FROM SERVICE

501. Persons attending court—Witnesses.

DIVISION V.—OBJECTIONS AND AMENDMENTS

502. Motion to quash—Form.
503. Amendment.
504. Where service by publication.
505. Waiver of objections.

ARTICLE III

APPEARANCE

506. For infant.
507. General appearance.
508. Special appearance.
509. Effect.
510. Waiver of process.
511. Objections—Preservation and waiver.

CHAPTER X

CONTINUANCE AND DISMISSAL

512–526. Article I.—Continuance.
527–539. Article II.—Dismissal.

ARTICLE I

CONTINUANCE

512. When granted—Discretion.
513. Stipulation.
514. Grounds—Illness of party.
515. Accident or mistake.
516. Amendment of pleading.
517. Absence of counsel.
518. Depositions.
519. Absence of witness.

Sections
520. Surprise at trial.
521. Admissions to prevent continuance.
522. Offer to confess judgment.
523. Application and affidavit—Forms.
524. Time of making.
525. Further continuances.
526. Objections—Waiver.

ARTICLE II

DISMISSAL

527. Dismissal without prejudice.
528. Right—Discretion.
529. Involuntary—Discretion—Grounds.
530. Process—Pleadings—Non-compliance with order
531. Continuance.
532. Want of prosecution.
533. Forms—Motion to dismiss—Order.
534. Reinstatement.
535. Dismissal without order of court.
536. Parties.
537. Dismissal as to part of defendants.
538. Trial of counterclaim after dismissal.
539. Jurisdiction subsequent.

CHAPTER XI

PLEADINGS

540–544. Article I.—In general.
545–553. Article II.—Rules of pleading.
554–561. Article III.—Rules for construing pleadings.
562–587. Article IV.—Petition.
562. Division I.—In general.
563–579. Division II.—Contents, form, sufficiency, and construction.
580–585. Division III.—Joinder, splitting, consolidation, and severance.
586–587. Division IV.—Exhibits and prayer.
588–637. Article V.—Answer.
588–602. Division I.—Answer in general.
603–606. Division II.—General denial.
607–615. Division III.—Verified denial.
616–635. Division IV.—Counterclaim and set-off.
636–637. Division V.—Unauthorized pleas.
638–645. Article VI.—Reply.
646–648. Article VII.—Filing and subscribing.
649–660. Article VIII.—Amended and supplemental pleadings.
661–664. Article IX.—Defects and objections.
665–702. Article X.—Motions and orders thereon.
665–673. Division I.—Motions in general.
674–678. Division II.—Orders.
679–702. Division III.—Particular motions.

Sections
703–721. Article XI.—Demurrer.
722–733. Article XII.—Issues, proof, and variance.
722–728. Division I.—Issues.
729–732. Division II.—Proof.
733. Division III.—Variance.

ARTICLE I

IN GENERAL

540. Defined.
541. Pleadings allowed.
542. Nature, how determined.
543. Caption—Forms.
544. Counties.

ARTICLE II

RULES OF PLEADING

545. Former rules abolished.
546. What must be pleaded.
547. Special matters.
548. Estoppel.
549. Pleading conclusions and law.
550. Pleading evidence.
551. Uncertainty in pleadings.
552. Pleading in the alternative.
553. Pleading by reference.

ARTICLE III

RULES FOR CONSTRUING PLEADINGS

554. Liberal construction.
555. General and specific allegations.
556. Admissions.
557. Presumptions.
558. Surplusage.
559. Construction against pleader.
560. Construing allegations together.
561. Construed as of what time.

ARTICLE IV

PETITION

Division I.—In General

562. Copy for defendant.

Division II.—Contents, Form, and Construction

563. Contents.
564. Designation of parties.

Sections
565. Of unknown defendant.
566. Necessary allegations.
567. Presumptions—Judicial notice.
568. Judgment—Form.
569. Form and manner of allegations.
570. Election.
571. Contractual conditions precedent—Form.
572. Instrument for payment of money—Private statute—Form.
573. Libel or slander—Form.
574. Construction and operation.
575. Requisites and sufficiency.
576. Fraud—Form.
577. Limitations—Form.
578. Matters necessary to be pleaded.
579. Forms—Petitions.

DIVISION III.—JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE

580. Joinder—Forms of motions.
581. Separately stating and numbering.
582. Where demurrer sustained.
583. Splitting.
584. Consolidation.
585. Order—Forms.

DIVISION IV.—EXHIBITS AND PRAYER

586. Exhibits.
587. Prayer.

ARTICLE V

ANSWER

DIVISION I.—ANSWER IN GENERAL

588. Contents—Forms.
589. Construction.
590. Joinder.
591. Matters necessary to plead.
592. Affirmative defenses—Forms.
593. Fraud—Form.
594. Limitations—Form.
595. Pleading defenses in action on note.
596. Pleading attachment or garnishment.
597. Defenses in replevin.
598. Adverse possession.
599. Inconsistent defenses.
600. Negative pregnant.
601. Defense in libel and slander.
602. Supplemental answer.

DIVISION II.—GENERAL DENIAL

603. Effect and sufficiency.
604. Disclaimer—Form.
605. Must be entered for whom.
606. Effect—By guardian ad litem.

DIVISION III.—VERIFIED DENIAL

Sections
607. Verification in general.
608. Who may verify.
609. How made—On belief.
610. Execution of written instruments—Indorsement.
611. Appointment or authority.
612. Account.
613. Corporation and partnership.
614. Waiver.
615. Forms.

DIVISION IV.—COUNTERCLAIM AND SET-OFF

616. Counterclaim—Nature—Right to interpose—Set-off—Limitations.
617. Set-off—Right to interpose.
618. Defined and distinguished—Statute applied.
619. Subsisting right.
620. Equity.
621. Cross-bill or cross-petition.
622. Landlord and tenant.
623. Action against United States.
624. Cross-demands—Deprivation.
625. Assignments.
626. Definition.
627. Parties and mutuality.
628. New party—Counterclaim.
629. New party—Set-off.
630. Form and requisites.
631. Notice.
632. Waiver.
633. Withdrawal.
634. Neglect to claim—Cost.
635. Forms.

DIVISION V.—UNAUTHORIZED PLEAS

636. Plea in abatement.
637. Plea in bar.

ARTICLE VI

REPLY

638. Reply or demurrer.
639. When reply necessary.
640. Counterclaim or set-off in reply.
641. Demurrer or reply to answer by codefendant.
642. Construction and effect.
643. Requisites and sufficiency—Forms.
644. Departure.
645. Waiver of objections.

ARTICLE VII

FILING AND SUBSCRIBING

646. Time for filing.
647. Additional time—Withdrawal—Service of amendment.
648. Signing.

ARTICLE VIII

AMENDED AND SUPPLEMENTAL PLEADINGS

Sections
649. Amendment before answer.
650. Formal defects.
651. Allowance of amendment—Discretion—Forms.
652. Variance.
653. Failure of proof.
654. Amendment on demurrer.
655. Continuance after amendment.
656. Notice of amendment.
657. Interlineation.
658. Subject-matter of amendment.
659. Supplemental pleadings.
660. Lost pleadings.

ARTICLE IX

DEFECTS AND OBJECTIONS

661. Immaterial errors.
662. Cure of error.
663. Waiver.
664. Objection to introduction of any evidence—Form.

ARTICLE X

MOTIONS AND ORDERS THEREON

Division I.—Motions in General

665. Definition—Several objects.
666. Notice—Form.
667. Service—Return—Form.
668. By officer—Fees.
669. Appearance.
670. Affidavits and pleadings to motion.
671. Hearing.
672. Effect of continuance.
673. Second motion.

Division II.—Orders

674. Ruling—Form.
675. Law of the case.
676. Nunc pro tunc order—Form.
677. Entry—Notice.
678. Vacating and modifying.

Division III.—Particular Motions

679. Motion to dismiss.
680. Motion for judgment on the pleadings—Nature—Form.
681. Grounds for sustaining or overruling.
682. Departure.
683. Judgment against verdict.
684. Motion to strike from files—Form.

Sections
685. Affirmative pleading.
686. Defensive pleadings.
687. Demurrer.
688. Departure.
689. Limitations.
690. Amended pleading.
691. Failure to amend.
692. Motion to strike from pleading—Form.
693. Motion to strike parties—Form.
694. Motion to make more definite and certain.
695. Form and requisites.
696. Time of making.
697. Waiver—Dismissal.
698. Motion to require pleader to separately state and number.
699. Form and requisites.
700. Waiver—Dismissal.
701. Motion to require election—Form.
702. Time of making.

ARTICLE XI

DEMURRER

703. Grounds—Forms.
704. Misjoinder of parties.
705. Office of demurrer.
706. Requisites and construction.
707. Time to demur—After motions.
708. Admissions for purpose of demurrer.
709. General demurrer.
710. Limitations.
711. Objection to introduction of any evidence as alternative.
712. Demurrer and answer.
713. Where single count.
714. Joint demurrer.
715. Demurrer to answer.
716. To amended answer.
717. To set-off or counterclaim.
718. Demurrer to reply.
719. Demurrer relating back.
720. Construction of pleading demurred to.
721. Ruling, order, and judgment.

ARTICLE XII

ISSUES, PROOF, AND VARIANCE

Division I.—Issues

722. Kinds.
723. Of law.
724. Of fact.
725. Where both issues arise.
726. Allegations deemed true.

Sections
727. Admissions.
728. Material allegation.

DIVISION II.—PROOF

729. Proof required under certain pleadings—Verified denial.
730. Proof admissible under pleadings.
731. Under general denial.
732. When evidence admissible of facts not pleaded.

DIVISION III.—VARIANCE

733. Rules and application.

CHAPTER XII

DEPOSITIONS AND AFFIDAVITS

734–774. Article I.—Depositions.
775–780. Article II.—Affidavits.

ARTICLE I

DEPOSITIONS

734. Defined.
735. When taken.
736. Subpœna for deposition.
737. Contempt—Discharge.
738. Abuse of process.
739. Stipulation.
740. Before whom taken.
741. Depositions taken out of state.
742. Officer disinterested.
743. Commission.
744. Notice.
745. Publication notice.
746. Contempt—Refusal to testify.
747. Writing of depositions.
748. Filing.
749. Authentication.
750. Certificate.
751. When to be filed.
752. Fees for taking.
753. Exceptions.
754. Requisites and sufficiency.
755. To be decided before trial.
756. Incompetency and irrelevancy.
757. Motion to suppress—Form.
758. Objections at hearing.
759. Waiver of objections.
760. Perpetuating testimony.
761. Petition—Form.
762. Order for examining witnesses—Form.
763. Cross-interrogatories.

Sections
764. Before whom taken.
765. Filing and use—Costs.
766. Error waived by not excepting.
767. When deposition may be used.
768. Unavailability of witness.
769. Deposition as evidence.
770. May be read when.
771. Admission of part of deposition.
772. Copies.
773. Interpleader.
774. Forms.

ARTICLE II

AFFIDAVITS

775. Definition.
776. Use.
777. Jurat.
778. Before whom taken.
779. By whom made.
780. Forms.

CHAPTER XIII

TRIAL

781–795. Article I.—In general.
796–801. Article II.—Argument and conduct of counsel.
802–824. Article III.—Issues and trial thereof.
802. Division I.—Issues in general.
803–824. Division II.—Taking case or question from jury.

ARTICLE I

IN GENERAL

781. Definition.
782. Time of trial.
783. Waiver of right.
784. Docket.
785. Copy for bar.
786. Presence of judge.
787. Presence of parties and attorneys.
788. Conduct and remarks of judge.
789. Consolidation.
790. Separate trials—Several defendants.
791. Reporter—Duties.
792. Order of trial—Issues—Damages—Motions—Objections.
793. Waiver of right to object.
794. Issues—Trial by court or jury.
794a. Trial by court.
794b. Agreed statement of facts.
795. Submission without suit.

ARTICLE II

ARGUMENT AND CONDUCT OF COUNSEL

Sections
796. Opening statement.
797. Argument.
798. Right to open and close.
799. Retaliatory statements.
800. Conduct.
801. Objections and exceptions.

ARTICLE III

ISSUES AND TRIAL THEREOF

Division I.—Issues in General

802. Issues not pleaded.

Division II.—Taking Case or Question from Jury

803. In general.
804. Retrial.
805. Questions of law and fact.
806. Negligence in general.
807. Contributory negligence—Assumption of risk.
808. Agency.
809. Will contest.
810. Malicious prosecution.
811. Libel and slander.
812. Weight of evidence and credibility of witnesses.
813. Uncontroverted evidence.
814. Motions and demurrer.
815. Demurrer to evidence.
816. Effect as admission.
817. What rulings proper.
818. Cure of error.
819. Trial by court.
820. Ruling and judgment sustaining demurrer.
821. Form.
822. Direction of verdict.
823. Effect of motion.
824. Form of motion.

CHAPTER XIV

WITNESSES

825–840. Article I.—Procuring attendance and testimony.
841–859. Article II.—Examination of witnesses.
841–852. Division I.—Direct examination.
853–858. Division II.—Cross-examination.
859. Division III.—Redirect examination.
860–874. Article III.—Competency and privilege.
875–888. Article IV.—Credibility and impeachment.

ARTICLE I

PROCURING ATTENDANCE AND TESTIMONY

Sections
825. Taking testimony—Modes.
826. Oath—Interpreter.
827. Subpœna—Issuance.
828. Contents—Duces tecum.
829. Service.
830. Disobedience of—Contempt.
831. Forms.
832. Attachment for nonattendance.
833. Punishment.
834. Requisites of—Form.
835. Prisoners as witnesses.
836. Custody.
837. Attendance.
838. Of adverse party.
839. Witness may demand fees.
840. Refusal to testify—Contempt.

ARTICLE II

EXAMINATION OF WITNESSES

Division I.—Direct Examination

841. Mode of testifying.
842. Questions.
843. Leading questions.
844. Hostile witnesses.
845. Repetition.
846. Interrogation by court.
847. Responsiveness of answer.
848. Aids to explain testimony—Diagrams—Computation.
849. Refreshing memory.
850. Memoranda as evidence.
851. Stenographer's notes.
852. Recalling witnesses.

Division II.—Cross-Examination

853. Extent of cross-examination.
854. Limitation to subjects of direct examination.
855. Collateral and irrelevant matters.
856. Character witness.
857. Cross-examination of party.
858. Recalling witness.

Division III.—Redirect Examination

859. Scope and extent.

ARTICLE III

COMPETENCY AND PRIVILEGE

Sections
860. In general.
861. Knowledge—Signature—Books and accounts.
862. Persons interested.
863. Adverse party.
864. Incompetents.
865. Husband and wife.
866. Attorney and client.
867. Clergyman or priest.
868. Physician and patient.
869. Construction of statutes.
870. Conviction of crime.
871. Self-incrimination.
872. Waiver.
873. Transactions with decedent.
874. Witness privileged from being sued.

ARTICLE IV

CREDIBILITY AND IMPEACHMENT

875. Credibility.
876. Corroboration.
877. Impeachment.
878. Impeaching own witness.
879. Character and conduct of witness.
880. Reputation—Place and time of acquiring.
881. Particular facts.
882. Conviction of crime.
883. Cross-examination to test reliability or to discredit.
884. Conduct in reference to the case.
885. Inconsistent statements.
886. Contradicting witness.
887. Prior corroborating statements.
888. Sustaining evidence.

VOLUME II

CHAPTER XV

EVIDENCE

Sections
889–911. Article I.—In general.
889–898. Division I.—Preparation for trial.
899–911. Division II.—Reception of evidence.
912–922. Article II.—Judicial notice.
923–949. Article III.—Presumptions.
950–965. Article IV.—Burden of proof.
966–1103. Article V.—Admissibility.
966–987. Division I.—Relevancy and materiality.
988–993. Division II.—Res gestæ.
994–996. Division III.—Similar matters.
997–1019. Division IV.—Documentary evidence.
997–1010. Subdivision I.—Statutes, ordinances, and public records.
1011–1019. Subdivision II.—Private writings.
1020–1039. Division V.—Parol and extrinsic evidence.
1040–1064. Division VI.—Opinion evidence.
1040–1060. Subdivision I.—Nonexpert testimony.
1061–1064. Subdivision II.—Expert testimony.
1065–1067. Division VII.—Hearsay.
1068–1073. Division VIII.—Declarations.
1074–1082. Division IX.—Best and secondary evidence.
1083–1086. Division X.—Demonstrative evidence.
1087–1103. Division XI.—Admissions.
1104–1141. Article VI.—Quantum, weight and sufficiency.

ARTICLE I

IN GENERAL

Division 1.—Preparation for Trial

889. Genuineness of writings—Admission.
890. Documents—Preliminary inspection.
891. Copy of writing.
892. Duty to furnish evidence.
893. Misconduct—Falsifying evidence.
894. Fraud or deceit to witness.
895. Preparation of false evidence.
896. Destruction of evidence.
897. Keeping witness from attending.
898. Bribery of witness.

Division II.—Reception of Evidence

899. Oral examination—Objections.
900. Exclusion of witnesses.

Sections
901. Offer of proof.
902. Restricting to special purpose.
903. Withdrawal of evidence.
904. Limiting number of witnesses.
905. Order of proof.
906. Preliminary proof.
907. Rebuttal and surrebuttal.
908. Reopening case.
909. Objections—Forms.
910. Motion to strike out—Form.
911. Exceptions.

ARTICLE II

JUDICIAL NOTICE

912. Matters of common knowledge.
913. Political subdivisions.
914. Legislature.
915. Laws and ordinances.
916. Acts of Congress.
917. Laws of other states.
918. Indians.
919. Jurisdiction of courts.
920. Judicial proceedings.
921. Officials—Authority.
922. Rules and acts.

ARTICLE III

PRESUMPTIONS

923. In general.
924. Knowledge of law.
925. Continuance of fact.
926. Personal status.
927. Indians.
928. Regularity in business.
929. Mail matter.
930. Available evidence not produced.
931. Laws of another state.
932. Judicial proceedings.
933. Official acts.
934. Carriers.
935. Railroads—Injury to passenger.
936. Injury to employee.
937. Damage to property.
938. Wrongful death.
939. Death.
940. Fraud.
941. Contracts.
942. Agency.
943. Reports—Records—Partnership.
944. Wills.

Sections
945. Trusts.
946. Bills and notes.
947. Marriage.
948. Payment.
949. Libel and slander.

ARTICLE IV

BURDEN OF PROOF

950. In general.
951. Personal status.
952. Particular issues.
953. Contracts.
954. Bailment.
955. Bills and notes—Execution.
956. Holder.
957. Consideration.
958. Insurance—In general.
959. Proof of loss.
960. Misrepresentation or breach.
961. Indians.
962. Statute of limitations.
963. Damages.
964. Malicious prosecution.
965. Negligence.

ARTICLE V

ADMISSIBILITY

DIVISION I.—RELEVANCY AND MATERIALITY

966. Pertinent to issues.
967. Materiality.
968. Value.
969. Reasonable compensation.
970. Damages.
971. Personal injuries.
972. Wrongful death.
973. Negative evidence.
974. Will contest.
975. Divorce.
976. Fraud.
977. Insurance.
978. Marriage.
979. Price.
980. Title.
981. Services.
982. Condemnation proceedings.
983. Agency and partnership.
984. Unlawful arrest.
985. Entire conversation or transaction.
986. Telephone conversations.
987. Motive or intent.

DIVISION II.—RES GESTÆ

Sections
988. What constitutes.
989. Discretion.
990. Declarations.
991. Injury and pain.
992. Acts and statements.
993. Directions.

DIVISION III.—SIMILAR MATTERS

994. In general.
995. Fraud.
996. Custom—Accidents—Value.

DIVISION IV.—DOCUMENTARY EVIDENCE

Subdivision I.—Statutes, Ordinances, and Public Records

997. Acts of Congress—Statute books—Legislative journals.
998. Foreign laws.
999. Ordinances.
1000. Congressional documents.
1001. Copies—Public records.
1002. Official books and records.
1003. Court records and files.
1004. Records of justice of the peace.
1005. Departmental records.
1006. Land office receipts and records.
1007. Official signatures presumed genuine.
1008. Authentication.
1009. Copies of foreign records.
1010. Translations.

Subdivision II.—Private Writings

1011. Church records.
1012. Corporate records.
1013. Written instruments.
1014. Recitals in deeds and mortgages.
1015. Account books.
1016. Memoranda.
1017. Letters.
1018. Maps and photographs.
1019. Identification and authenticity.

DIVISION V.—PAROL AND EXTRINSIC EVIDENCE

1020. Contracts.
1021. Insurance policies.
1022. Notes and indorsements.
1023. Deeds and mortgages.
1024. Tickets, bills of lading, and receipts.
1025. Release.
1026. Court records.
1027. Ordinances.
1028. Memoranda and incomplete contracts.

Sections
1029. Minutes.
1030. Wills.
1031. Surety and guaranty.
1032. Agency.
1033. Consideration.
1034. Delivery.
1035. Mistake.
1036. Fraud—Duress.
1037. Separate or subsequent oral contract.
1038. Evidence explanatory of writing.
1039. Evidence showing performance or discharge.

DIVISION VI.—OPINION EVIDENCE

Subdivision I.—Nonexpert Testimony

1040. Conclusions and opinions in general.
1041. Nonexpert witnesses in general.
1042. Foundation.
1043. Discretion.
1044. Value.
1045. Paternity, race, and age.
1046. Mental condition.
1047. Physical appearances, conduct, and condition.
1048. Financial condition.
1049. Medical and surgical practice.
1050. Speed.
1051. Damages.
1052. Amount.
1053. Custom and usage.
1054. Habits and nature.
1055. Ownership.
1056. Agency.
1057. Handwriting.
1058. Identification.
1059. Dangerous and safe conditions—Negligence.
1060. Competency and skill.

Subdivision II.—Expert Testimony

1061. Subject-matter.
1062. Competency of experts.
1063. Examination of experts—Hypothetical questions.
1064. Handwriting.

DIVISION VII.—HEARSAY

1065. In general.
1066. Statements of others than parties or witnesses.
1067. Evidence based on hearsay.

DIVISION VIII.—DECLARATIONS

1068. Intent.
1069. Self-serving declarations.
1070. Against interest.
1071. Persons in possession.

Sections
1072. Age and pedigree.
1073. Dying declarations

DIVISION IX.—BEST AND SECONDARY EVIDENCE

1074. Necessity of best evidence.
1075. Matters evidenced by writing.
1076. Public records.
1077. Court records.
1077a. Evidence at former trial or other proceeding.
1078. Contents of writing.
1079. Collateral writings.
1080. Copies.
1081. Secondary evidence admissible when.
1082. Notice.

DIVISION X.—DEMONSTRATIVE EVIDENCE

1083. Exhibition of person.
1084. Exhibition of articles.
1085. Experiments and tests.
1086. Handwriting.

DIVISION XI.—ADMISSIONS

1087. Judicial admissions.
1088. Offers of compromise.
1089. Written statements.
1090. Conduct.
1091. Acquiescence or silence.
1092. Admissions by parties or others interested.
1093. Admissions of former owners or privies.
1094. Admissions by agents.
1095. Admissions by corporate and municipal officers.
1096. Husband and wife.
1097. Principal and surety.
1098. Guardian.
1099. Conspirators.
1100. Preliminary evidence.
1101. Mode of proof.
1102. Explanation.
1103. Construction.

ARTICLE VI

QUANTUM, WEIGHT, AND SUFFICIENCY

1104. Consideration of testimony in general.
1105. Uncontradicted evidence.
1106. Quantum of proof in general.
1107. Prima facie evidence.
1108. Circumstantial evidence.
1109. Affirmative and negative evidence—Conclusions.
1110. Effect of opinion evidence.
1111. Effect of admissions.
1112. Testimony of party.
1113. Party bound by his own evidence.

Sections
1114. Contracts.
1115. Notes.
1116. Conveyances.
1117. Gifts.
1118. Insurance.
1119. Trusts.
1120. Wills.
1121. Court records and files.
1122. Partnership.
1123. Agency and official capacity.
1124. Sales.
1125. Fraud.
1126. Negligence and cause.
1127. Novation.
1128. Title.
1129. Payment—Receipts.
1130. Amount of damages.
1131. Usury.
1132. Copy of articles of incorporation.
1133. Recovery of penalties.
1134. Abandonment of homestead.
1135. Financial status.
1136. Ejectment.
1137. Attachment.
1138. Cancellation of instruments.
1139. Reformation of instruments.
1140. Divorce.
1141. Bastardy.

CHAPTER XVI

JURY

1142–1150. Article I.—Right to jury trial.
1151–1162. Article II.—Jury panel.
1163–1171. Article III.—Qualifications, challenges, and exemptions.
1172–1175. Article IV.—Oath, number, term, and summoning.
1176–1189. Article V.—Custody, conduct, and deliberations.
1190–1203. Article VI.—Verdict.
1204–1216. Article VII.—Special interrogatories and findings.

ARTICLE I

RIGHT TO JURY TRIAL

1142. Right to jury trial—Verdict.
1143. Waiver.
1144. In equity cases.
1145. Trial of issues.
1146. In actions at law or in equity or mixed actions.
1147. In particular actions or proceedings.
1148. In special proceedings.

Sections
1149. On intermediate appeal.
1150. Infringement of right.

ARTICLE II

JURY PANEL

1151. Jury commission.
1152. Meeting of jury commissioners—Quorum.
1153. Jury lists.
1154. Lists to be certified.
1155. District court—How drawn.
1156. Venires—How served—Form.
1157. Open venires—Talesmen—Form.
1158. County court—How selected.
1159. Procedure when regular panel exhausted.
1160. Qualifications of jurors—Exemptions.
1161. Former list removed when new list selected.
1162. Irregularities in drawing.

ARTICLE III

QUALIFICATIONS, CHALLENGES, AND EXEMPTIONS

1163. Challenges to panel.
1164. Statutory grounds for challenge.
1165. Qualifications in general.
1166. Waiver of objection.
1167. Order of challenges.
1168. Challenges for cause.
1169. Vacancies filled at once.
1170. Talesmen.
1171. Exemptions.

ARTICLE IV

OATH, NUMBER, TERM, AND SUMMONING

1172. Oath.
1173. Number of jurors.
1174. Term of service.
1175. Selection and summoning.

ARTICLE V

CUSTODY, CONDUCT, AND DELIBERATIONS

1176. Admonition.
1177. Misconduct of others.
1178. View of premises.
1179. Taking papers and articles to jury room.
1180. Additional instructions.
1181. Information after retirement.

Sections
1182. Custody of jury during deliberations.
1183. Deliberations.
1184. Coercing verdict.
1185. Quotient verdict.
1186. Improper considerations.
1187. Matters considered—Evidence read—Personal knowledge of juror.
1188. Discharge of jury.
1189. Objections and exceptions.

ARTICLE VI

VERDICT

1190. Definition, form, and reception.
1191. Number of jurors assenting.
1192. Signature.
1193. Polling of jurors.
1194. Parties—Designation.
1195. Severance—Variance.
1196. Several counts.
1197. Surplusage.
1198. Disregarding instructions.
1199. Amending and correcting verdict.
1200. Construction and operation.
1201. Impeachment of verdict.
1202. Objections and exceptions.
1203. Form.

ARTICLE VII

SPECIAL INTERROGATORIES AND FINDINGS

1204. Special verdict and findings.
1205. Power to require.
1206. Interrogatories.
1207. Preparation and form.
1208. Withdrawal.
1209. Special findings.
1210. Requisites and sufficiency.
1211. Responsiveness.
1212. Inconsistency.
1213. Defects and amendments.
1214. Construction.
1215. Objections and exceptions.
1216. Form.

CHAPTER XVII

INSTRUCTIONS

1217. Definition.
1218. Province of court.
1219. Defining words and terms.

Sections
1220. Verdict—Findings—Deliberations and determination of jury—Argument of counsel.
1221. Province of jury.
1222. Written instructions—Request.
1223. Time of making request.
1224. Time of giving instructions
1225. Accuracy.
1226. Misleading instructions.
1227. Formal requisites and sufficiency.
1228. Instructions and pleadings.
1229. Instructions and evidence.
1230. Illustrations.
1231. Withdrawal of instructions.
1232. Instructions on issues.
1233. Applicability to pleadings and evidence.
1234. Positive and negative evidence.
1235. Limiting effect of evidence.
1236. Matters of general knowledge.
1237. Requested instructions.
1237a. Objections and exceptions.
1238. Forms.

CHAPTER XVIII

JUDGMENT

1239–1244. Article I.—Definition, validity, and parties.
1245–1252. Article II.—Confession of judgment.
1253–1261. Article III.—Conformity.
1253–1255. Division I.—Conformity to issues.
1256–1259. Division II.—Conformity to verdict.
1260–1261. Division III.—Conformity to findings.
1262–1291. Article IV.—Rendition, form, and requisites.
1262–1267. Division I.—In general.
1268–1271. Division II.—Rendition.
1272–1275. Division III.—Equity.
1276–1291. Division IV.—Record of judgment.
1292–1304. Article V.—Default judgment.
1292–1299. Division I.—Requisites and validity.
1300–1304. Division II.—Opening and vacating judgment.
1305–1324. Article VI.—Reversing, vacating, or modifying.
1305–1314. Division I.—Authority to review.
1315–1324. Division II.—Proceedings.
1325–1364. Article VII.—Operation, construction, enforcement, and satisfaction.
1325–1331. Division I.—In general.
1332–1335. Division II.—Enforcement.
1336–1347. Division III.—Payment, satisfaction, and discharge.
1348–1364. Division IV.—Judgment liens.
1365–1370. Article VIII.—Assignment of judgment.
1371–1394. Article IX.—Collateral attack.
1371–1374. Division I.—Judgment impeachable collaterally.

Sections
1375–1390. Division II.—Grounds of attack.
1391–1392. Division III.—Proceedings.
1393–1394. Division IV.—Probate of wills.
1395–1461. Article X.—Res adjudicata.
1395–1411. Division I.—In general.
1412–1425. Division II.—Causes of action or defenses merged, barred, or concluded.
1426–1429. Division III.—Persons to whom bar available.
1430–1440. Division IV.—Judgments conclusive in general.
1441–1453. Division V.—Persons concluded.
1454–1461. Division VI.—Matters concluded.
1462–1467. Article XI.—Amount of recovery.
1468–1471. Article XII.—Actions on judgments.
1472–1478. Article XIII.—Equitable relief.
1479–1485. Article XIV.—Foreign judgments.
1486–1488. Article XV.—Transcript.

ARTICLE I

DEFINITION, VALIDITY, AND PARTIES

1239. Definition.
1240. Validity.
1241. Jurisdiction.
1242. Judgment in rem.
1243. Parties.
1244. New parties.

ARTICLE II

CONFESSION OF JUDGMENT

1245. Confession by defendant—Form.
1246. By prisoner—Witness.
1247. By attorney—Authority.
1248. By agreement.
1249. Cause to be stated.
1250. Affidavit.
1251. Enforcement.
1252. Offer to confess judgment—Form.

ARTICLE III

CONFORMITY

Division I.—Conformity to Issues

1253. Conformity to issues in general.
1254. Conformity to pleadings.
1255. Prayer.

DIVISION II.—CONFORMITY TO VERDICT

Sections
1256. Judgment on verdict.
1257. Interest.
1258. On special verdict.
1259. Judgment against verdict.

DIVISION III.—CONFORMITY TO FINDINGS

1260. Supported by findings.
1261. Approval of findings.

ARTICLE IV

RENDITION, FORM, AND REQUISITES

DIVISION I.—IN GENERAL

1262. For defendant.
1263. Against infant.
1264. On motion.
1265. Judgment in foreclosure suit.
1266. Appeal from county commissioners.
1267. Corporations—Involuntary dissolution.

DIVISION II.—RENDITION

1268. Time.
1269. Ejectment.
1270. Interplea.
1271. Bastardy.

DIVISION III.—EQUITY

1272. In general.
1273. Specific performance.
1274. Foreclosure.
1275. Mechanic's lien.

DIVISION IV.—RECORD OF JUDGMENT

1276. Journal entry—Form.
1277. Clerk to make record.
1278. When made.
1279. Contents.
1280. To be signed.
1281. Completing record.
1282. Conclusiveness.
1283. Nunc pro tunc orders.
1284. Lost or destroyed judgment.
1285. Filing transcript—Justice's judgment.
1286. In other county.
1287. Record in realty case.
1288. Recording.
1289. Involuntary dissolution.
1290. Record as notice.
1291. Orders and decrees.

ARTICLE V

DEFAULT JUDGMENT

Division I.—Requisites and Validity

Sections
1292. Petition.
1293. When party is in default.
1294. Proof taken—Damages.
1295. Time for rendering judgment.
1296. Validity of judgment—Service—Form of judgment.
1297. Actions to which state is party—Dismissal—Default—Notice to Attorney General.
1298. Notice—How given—Proof.
1299. Judgment without notice void.

Division II.—Opening and Vacating Default Judgment

1300. Opening judgment after default on service by publication.
1301. Excusable default.
1302. Pleading—Form.
1303. Valid defense—Excuse—Petition—Effect of motion.
1304. Discretion of court.

ARTICLE VI

REVERSING, VACATING OR MODIFYING

Division I.—Authority to Review

1305. Jurisdiction and power.
1306. During term.
1307. After term.
1308. Common-law powers.
1309. Want of jurisdiction.
1310. Other remedies.
1311. Errors—Irregularities.
1312. Law.
1313. Pleading.
1314. Operation and effect.

Division II.—Proceedings

1315. Motion—Form.
1316. Petition—Form.
1317. Hearing.
1318. Evidence.
1319. Trial of ground of review.
1320. Defense must be shown.
1321. Suspending proceedings—Bond—Forms.
1322. Premature judgment.
1323. Time for application.
1324. Applicable to what courts.

ARTICLE VII

OPERATION, CONSTRUCTION, ENFORCEMENT, AND SATISFACTION

Division I.—In General

Sections
1325. Establishes claim.
1326. Death after verdict.
1327. For recovery of land.
1328. Surety.
1329. Joint defendants.
1330. Interpretation—Interest.
1331. Conclusiveness.

Division II.—Enforcement

1332. Judgments before death.
1333. Guaranty companies.
1334. Conveyance ordered—Form of order.
1335. Alimony.

Division III.—Payment, Satisfaction, and Discharge

1336. Dormant judgments.
1337. Revival.
1338. Necessity.
1339. Death of party.
1340. Proceedings—Forms.
1341. Effect of revival.
1342. Mode of payment.
1343. Set-off of judgments.
1344. Merger.
1345. Release.
1346. Compelling satisfaction.
1347. Vacating satisfaction—Forms.

Division IV.—Judgment Liens

1348. Statutory regulations—Lien on real estate.
1349. Nature of lien.
1350. Debtor's realty.
1351. Extent of lien.
1352. Lien of corporation commission.
1353. Homestead.
1354. Osage Indian lands.
1355. Alimony.
1356. Animals.
1357. Judgments against counties.
1358. Receipt by clerk.
1359. Priorities.
1360. Judgment and conveyances.
1361. Prior unrecorded deed.
1362. Receivership.
1363. Duration of lien.
1364. Postponement of lien.

ARTICLE VIII

ASSIGNMENT OF JUDGMENT

Sections
1365. In general.
1366. Consideration and validity.
1367. Setting aside assignment.
1368. Effect of transfer.
1369. Rights of parties.
1370. As to each other.

ARTICLE IX

COLLATERAL ATTACK

DIVISION I.—JUDGMENTS IMPEACHABLE COLLATERALLY

1371. In general.
1372. Particular courts—County court—District court.
1373. Federal court.
1374. Nature of subject-matter.

DIVISION II.—GROUNDS OF ATTACK

1375. Invalidity—In general.
1376. Default judgment.
1377. Want of jurisdiction.
1378. Want of service.
1379. Service by publication.
1380. Presumption of jurisdiction.
1381. Effect of recitals.
1382. Extrinsic evidence.
1383. Errors and irregularities—In general.
1384. As to parties.
1385. As to pleadings.
1386. In proceedings.
1387. Perjury.
1388. Fraud.
1389. Collusion.
1390. Available defenses.

DIVISION III.—PROCEEDINGS

1391. Nature of attacks.
1392. Preventing enforcement.

DIVISION IV.—PROBATE OF WILLS.

1393. In general.
1394. Ancillary probate.

ARTICLE X

RES ADJUDICATA

Division I.—In General

Sections
1395. Nature of former recovery.
1396. Nature of action—Warrant indebtedness.
1397. Equitable actions.
1398. Interplea.
1399. Real property.
1400. Criminal prosecutions.
1401. Scope of adjudication.
1402. Judgments without prejudice.
1403. Reserving rights.
1404. Default.
1405. Motion or summary proceedings.
1406. Void in part.
1407. Dismissal.
1408. Demurrer.
1409. Verdict without judgment.
1410. Pendency of appeal.
1411. Judgment vacated or reversed.

Division II.—Causes of Action or Defenses Merged, Barred, or Concluded

1412. Nature of merger.
1413. Elements of judgment.
1414. Identity of actions.
1415. Identity of subject-matter.
1416. Theory of action.
1417. Form of remedy.
1418. Grounds of action.
1419. Relief.
1420. Splitting actions—Single and entire.
1421. Accounts.
1422. Installments.
1423. Torts.
1424. Successive causes of action.
1425. Defenses concluded.

Division III.—Persons to Whom Bar Available

1426. Mutuality of estoppel.
1427. Parties or privies.
1428. Joint and several contractors.
1429. Joint tort-feasors.

Division IV.—Judgments Conclusive in General

1430. Nature—In general.
1431. Failure to appeal.
1432. Judgments of federal courts.
1433. Probate jurisdiction.
1434. Finality of determination.

Sections
1435. Special proceedings.
1436. Form of judgment.
1437. Confession or consent.
1438. Default.
1439. Judgment on motion.
1440. Erroneous judgment.

DIVISION V.—PERSONS CONCLUDED

1441. Identity of persons—In general.
1442. Unknown parties.
1443. Additional parties.
1444. Official capacity.
1445. Participating in action.
1446. Representatives.
1447. Privity in general.
1448. Vendor and purchaser.
1449. Other special relations.
1450. Coplaintiffs and codefendants.
1451. Persons not parties or privies.
1452. Evidence.
1453. Evidence of property rights.

DIVISION VI.—MATTERS CONCLUDED

1454. Scope of estoppel.
1455. Identity of subject-matter.
1456. Identity of issues.
1457. Matters not in issue.
1458. Issues undecided.
1459. Title or right to property.
1460. Rights under contracts.
1461. Real property.

ARTICLE XI

AMOUNT OF RECOVERY

1462. Damages—Assessment—Measure.
1463. Breach of warranty.
1464. Unlawful detention—Conversion.
1465. Use and occupation.
1466. Exemplary damages.
1467. Interest and attorney's fees.

ARTICLE XII

ACTIONS ON JUDGMENTS

1468. Cause of action.
1469. Who may sue.
1470. Review.
1471. Foreign judgments.

ARTICLE XIII

EQUITABLE RELIEF

Sections
1472. In general.
1473. Fraud.
1474. Injunction—Forms.
1475. Suit to vacate.
1476. Parties.
1477. Pleading.
1478. Evidence.

ARTICLE XIV

FOREIGN JUDGMENTS

1479. Recognition—In general.
1480. Jurisdiction.
1481. Judgment in rem.
1482. Fraud.
1483. Conclusiveness.
1484. Divorce and alimony.
1485. Enforcement in other states.

ARTICLE XV

TRANSCRIPT

1486. Filing judgment in district court—Forms.
1487. Certificate of amount paid.
1488. Revivor.

CHAPTER XIX

NEW TRIAL

1489–1493. Article I.—Scope of remedy.
1494–1505. Article II.—Grounds.
1506–1526. Article III.—Procedure.

ARTICLE I

SCOPE OF REMEDY

1489. Inherent power.
1490. Discretion.
1491. Waiver.
1492. Second application.
1493. Pendency of application—Its effect.

ARTICLE II

GROUNDS

Sections
1494. Statutory power.
1494a. Errors and irregularities in general.
1495. Misconduct.
1496. Rulings and instructions.
1497. Jurors—Disqualification—Misconduct—Communications.
1498. Defective verdict or findings.
1499. Verdict contrary to instructions.
1500. Verdict contrary to evidence.
1501. Special findings.
1502. Amount of recovery.
1503. Mistake, passion or prejudice.
1504. Surprise, accident or mistake.
1505. Newly discovered evidence.

ARTICLE III

PROCEDURE

1506. Application.
1507. When motion is proper—Form.
1508. Ruling of court on motion—Right to new trial.
1509. Time for making.
1510. Requisites—Application.
1511. Statement of grounds and specification of errors.
1512. Parties.
1513. Extrinsic evidence.
1514. Jurors.
1515. Affidavits—Forms.
1516. As to newly discovered evidence—Form.
1517. Transcript of evidence.
1518. Amendment.
1519. Abandonment of motion.
1520. Order—Forms.
1521. Setting aside.
1522. Hearing.
1523. Time.
1524. Conditions to granting.
1525. Reduction of verdict or remission of excess—Form of order.
1526. Petition for new trial—Form.

CHAPTER XX

COSTS

1527–1534. Article I.—Security for costs.
1535–1551. Article II.—Taxation of costs.
1552–1562. Article III.—Items taxable as costs.
1563–1571a. Article IV.—Collection and payment.
1572–1578. Article V.—Costs on appeal.

ARTICLE I

SURETY FOR COSTS

Sections
1527. In general—Statute.
1528. Bond—Form.
1529. Deposit.
1530. Pauper affidavit—Form.
1531. False swearing.
1532. Additional security.
1533. Failure to give security.
1534. Remedies against sureties—Form of motion.

ARTICLE II

TAXATION OF COSTS

1535. Right to award.
1536. Costs taxed by clerk.
1537. Costs where defendant disclaims.
1538. Costs go with judgment.
1539. Prevailing party.
1540. Costs that may be taxed at discretion of court.
1541. On motions.
1542. Quo warranto.
1543. Defendant.
1544. Apportionment.
1545. Waiver.
1546. On joint liability.
1547. Effect of tender or offer to confess judgment.
1548. Settlement, stipulation and abatement.
1549. Costs—Corporations—Involuntary dissolution.
1550. Liability of representative.
1551. Costs on interplea.

ARTICLE III

ITEMS TAXABLE AS COSTS

1552. Attorney's fees.
1553. Stenographer's fees.
1554. Receivership.
1555. Fees for legal publication—Taxed as costs.
1556. Contempt proceedings.
1557. Jurors.
1558. Witnesses.
1559. Guardian.
1560. Court clerks—Fees.
1561. Sheriffs and constables—Fees.
1562. County judge—Fees.

ARTICLE IV

COLLECTION AND PAYMENT

Sections
1563. Fees—When due.
1564. Process—Fees for service.
1565. Cost—Proof of payment.
1566. Costs—Statement of.
1567. Fees—Receipt for.
1568. Execution.
1569. Costs—By whom held.
1570. Mileage—Constructive.
1571. Municipal corporations.
1571a. Apportionment of deposits and collections.

ARTICLE V

COSTS ON APPEAL

1572. In general.
1573. Apportionment.
1574. Attorney fees.
1575. Case-made.
1576. Briefs.
1577. Motion to retax—Form.
1578. Dismissal of appeal.

CHAPTER XXI

EXECUTIONS

1579–1585. Article I.—Nature and requisites.
1586–1594. Article II.—Property subject.
1595–1605. Article III.—Issuance, form, and requisites.
1606–1634. Article IV.—Levy and enforcement.
1635–1653. Article V.—Sale and redemption.
1654–1661. Article VI.—Proceeds, amercement, and return.
1662–1670. Article VII.—Supplemental proceedings.
1671. Article VIII.—Wrongful execution.

ARTICLE I

NATURE AND REQUISITES

1579. Kinds.
1580. Judgment.
1581. Conformity to.
1582. Enforcement of.
1583. Contribution.
1584. Principal and surety.
1585. Several executions.

ARTICLE II

PROPERTY SUBJECT

Sections
1586. In general.
1587. Interests subject.
1588. Crops.
1589. Movable property of public service corporation.
1590. Corporation stock—Attachment and execution.
1591. Corporate franchises.
1592. Particular estates.
1593. Equitable interests.
1594. Property in custodia legis.

ARTICLE III

ISSUANCE, FORM, AND REQUISITES

1595. Issuance.
1596. On abstract or transcript of justice.
1597. To sheriff of another county.
1598. After death.
1599. Time.
1600. Contents—Forms.
1601. Amount.
1602. Alias writ.
1603. Seal.
1604. Amendment.
1605. Collateral attack.

ARTICLE IV

LEVY AND ENFORCEMENT

1606. Enforcement—Exemptions.
1607. Homestead exemption.
1608. Exemptions not to apply, when.
1609. Exemption of personalty not to apply, when.
1610. Pensions.
1611. Ministers' libraries.
1612. Motor vehicles—Claiming exemptions—Damages.
1613. Benevolent corporations.
1614. Order to appear—Forms.
1615. Priorities between executions.
1616. Attachments and executions—Who may levy.
1617. Void when otherwise levied.
1618. The levy.
1619. Advance of printer's fees.
1620. Appraisement and return.
1621. Property of officer.
1622. Excessive levy.
1623. Appraisement waived.
1624. Mortgaged chattels.

Sections
1625. Corporate stock.
1626. Redelivery bond—Form.
1627. Delivery on execution.
1628. Quashing execution—Form.
1629. Injunction.
1630. Creation of lien.
1631. Dependent on levy.
1632. Liens prior to execution.
1633. Duration of lien on realty.
1634. Claims of third persons—Bond—Form.

ARTICLE V

SALE AND REDEMPTION

1635. Duty of officer.
1636. Place of sale—Who may purchase.
1637. Alias execution.
1638. Time of sale.
1639. Notice of sale.
1640. Confirmation of sale.
1641. Setting aside sale—Form of motion and order.
1642. Waiver and estoppel.
1643. Collateral attack.
1644. Presumption of validity.
1645. Recovery of amount bid.
1646. Title of purchaser and interest acquired.
1647. Sheriff's deed—Form.
1648. Possession.
1649. Corporate stock.
1650. Corporate franchise—Form of certificate of purchase.
1651. Redemption of franchise.
1652. Irregularities.
1653. Reversal of judgment.

ARTICLE VI

PROCEEDS, AMERCEMENT, AND RETURN

1654. Clerk.
1655. Amercement—Forms.
1656. Execution mailed.
1657. Distribution among execution creditors.
1658. Surplus.
1659. Return—Form.
1660. Neglect of officer.
1661. Payment.

ARTICLE VII

SUPPLEMENTAL PROCEEDINGS

Sections
1662. In general.
1662a. Examination of debtor and others—Arrest—Contempt.
1663. Reference—Form.
1664. Receivers—Order of appointment—Form.
1665. Continuance.
1666. Lien on funds.
1667. Fees and costs.
1668. Contempt.
1669. Orders.
1670. Judgment enforced after death.

ARTICLE VIII

WRONGFUL EXECUTION

1671. Conversion—Damages.

CHAPTER XXII

JUDICIAL SALES

1672. Judgment or order—Forms.
1673. Appraisement.
1674. Authority to sell.
1675. Notice.
1676. Return, confirmation, and objections.
1677. Foreclosure.
1678. Opening or vacating sale—Forms.
1679. Resale—Form of order.
1680. Collateral attack.
1681. Title and rights of purchaser.
1682. Taxes.
1683. Wrongful sale.
1684. Validity.
1685. Foreclosure sale.
1686. Without appraisement.
1687. Right of redemption.
1688. Tax sales.
1689. Estray sales.

CHAPTER XXIII

REPLEVIN

1690–1703. Article I.—Rights and defenses.
1704–1707. Article II.—Jurisdiction and parties.
1708–1721. Article III.—Proceedings for taking and redelivery of property.
1722–1731. Article IV.—Pleadings and evidence.

Sections
1732–1733. Article V.—Damages.
1734–1752. Article VI.—Trial, judgment, enforcement of judgment, and review.
1753–1756. Article VII.—Liabilities on bonds and undertakings.

ARTICLE I

RIGHTS AND DEFENSES

1690. Remedy—Nature.
1691. Property subject.
1692. Scope—Equity.
1693. Liens on animals.
1694. Property seized under prohibitory law.
1695. Rent—Crop.
1696. Purchaser with notice liable.
1697. Plaintiff's right to possession.
1698. Detention by defendant.
1699. Defendant's possession.
1700. Conditions precedent.
1701. Demand for return.
1702. Defenses.
1703. Estoppel.

ARTICLE II

JURISDICTION AND PARTIES

1704. Waiver of jurisdiction.
1705. Plaintiff.
1706. Defendant.
1707. Intervention and substitution.

ARTICLE III

PROCEEDINGS FOR TAKING AND REDELIVERY OF PROPERTY

1708. In general.
1709. Affidavit—Form.
1710. Replevin undertaking—Form.
1711. Order of replevin—Form.
1712. To different counties.
1713. Execution of order.
1714. Officer may forcibly enter buildings.
1715. Custody of property.
1716. Statutory provisions for delivery by attachment.
1717. Redelivery to defendant—Undertaking—Form.
1718. Plaintiffs' objection to sureties—Form.
1719. Effect of redelivery.
1720. Quashing writ—Forms.
1721. Return.

ARTICLE IV

PLEADINGS AND EVIDENCE

Sections
1722. Complaint—Form and requisites.
1723. Demand.
1724. Amended and supplemental complaint.
1725. Amendment of affidavit.
1726. Issues, proof, and variance—Matters to be proved.
1727. Variance.
1728. Burden of proof.
1729. Defenses under answer—General denial.
1730. Evidence admissible.
1731. Sufficiency of evidence.

ARTICLE V

DAMAGES

1732. Elements of compensation.
1733. Exemplary damages.

ARTICLE VI

TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW

1734. Failure to prosecute.
1735. Scope of inquiry.
1736. Trial.
1737. Questions for jury.
1738. Directed verdict—Instructions.
1739. Verdict and findings—Requisites.
1740. Value of property—Description.
1741. New trial.
1742. Judgment—In general—Form.
1743. For defendant.
1744. Description of property.
1745. Possession or return.
1746. For value of property.
1747. Judgment in alternative.
1748. Damages.
1749. Operation and effect.
1750. Enforcement of judgment.
1751. Appeal and error.
1752. Costs.

ARTICLE VII

LIABILITIES ON BONDS AND UNDERTAKINGS

1753. Replevin bonds.
1754. Redelivery bonds.
1755. Discharge of sureties.
1756. Extent of liability.

CHAPTER XXIV

EJECTMENT

Sections
1757–1759. Article I.—Nature and right of action.
1760–1766. Article II.—Trial, recovery, and defenses.
1767–1769. Article III.—Damages.

ARTICLE I

NATURE AND RIGHT OF ACTION

1757. Possessory right.
1758. Form of action.
1759. Plaintiff must have right at commencement of action.

ARTICLE II

TRIAL, RECOVERY, AND DEFENSES

1760. Title to sustain action.
1760a. Petition—Form.
1761. Right to recover.
1762. Oil leases.
1763. Recovery where right ceases during action.
1764. Defenses.
1765. Evidence and instructions.
1766. New trial.

ARTICLE III

DAMAGES

1767. Questions to be determined.
1768. Improvements and taxes.
1769. Recovery of rent.

CHAPTER XXV

AUXILIARY PROCEEDINGS

1770–1848. Article I.—Attachment.
1770–1773. Division I.—Nature and grounds.
1774–1777. Division II.—Property subject.
1778–1783. Division III.—Procedure.
1784–1793. Division IV.—Order.
1794–1817. Division V.—Levy, lien, custody, and disposition of property.
1818–1834. Division VI.—Discharge of attachment.
1835–1839. Division VII.—Claims by third persons.
1840–1848. Division VIII.—Wrongful attachment.
1849–1880. Article II.—Garnishment.

Sections
1849–1851. Division I.—Nature and grounds.
1852–1857. Division II.—Persons and property subject.
1858–1868. Division III.—Procedure.
1869–1874. Division IV.—Operation and effect.
1875–1876. Division V.—Discharge of garnishment.
1877–1878. Division VI.—Claims by third persons.
1879–1880. Division VII.—Wrongful garnishment.
1881–1908. Article III.—Receivers.
1909–1915. Article IV.—Reference.
1916–1923. Article V.—Lis pendens.

ARTICLE I

ATTACHMENT

Division I.—Nature and Grounds

1770. Purpose and nature.
1771. Grounds.
1772. Rent.
1773. On claim not due.

Division II.—Property Subject to Attachment

1774. Personal property.
1775. Mortgaged chattels.
1776. Real property.
1777. Property in custodia legis.

Division III.—Procedure

1778. Jurisdiction and venue.
1779. Affidavit—Form.
1780. Amendment.
1781. Bond—Form.
1782. Additional security.
1783. Judgment.

Division IV.—Order

1784. Attachment order—Form.
1785. Issuance.
1786. Several orders—To different counties.
1787. Defects.
1788. Service of process.
1789. By publication—Form of affidavit.
1790. Return—When made.
1791. Contents and Form.
1792. Defects.
1793. Operation and effect.

DIVISION V.—LEVY, LIEN, CUSTODY, AND DISPOSITION OF PROPERTY

Sections
1794. Execution of order—Inventory and appraisement.
1795. Successive levies.
1796. Return.
1797. Creation of lien.
1798. Operation and effect.
1799. Priority—How determined—Reference.
1800. Between attachments and other liens.
1801. Transfer—Notice.
1802. Duration of liens.
1803. Release or abandonment.
1804. Custody of property.
1805. Receiver.
1806. Duties.
1807. Notice to debtors.
1808. Report of proceedings.
1809. Sheriff as receiver.
1810. Redelivery bond—Form.
1811. Disposition of property.
1812. Judgment for plaintiff.
1813. Delivery to sheriff.
1814. Possession by sheriff.
1815. Confirming or setting aside sale—Form of order.
1816. Surplus property.
1817. Interest conveyed.

DIVISION VI.—DISCHARGE OF ATTACHMENT

1818. Form of remedy.
1819. Grounds—In general.
1820. Irregular proceedings.
1821. Jurisdiction.
1822. Persons who may move.
1823. Proceedings on motion.
1824. Affidavits of defendant.
1825. Affidavits of plaintiff.
1826. Hearing.
1827. Evidence.
1828. Burden of proof.
1829. Dissolution—In general.
1830. Death of defendant.
1831. Security to discharge.
1832. Effect of dissolution.
1833. Judgment—Damages.
1834. Liability on bond.

DIVISION VII.—CLAIMS BY THIRD PERSONS

1835. Ownership—Liens.
1836. Grounds for contest.
1837. Estoppel—Mistake.
1838. Proceedings.
1839. Trial.

DIVISION VIII.—WRONGFUL ATTACHMENT

Sections
1840. Grounds of liability.
1841. Wrongful levy.
1842. Actions—Defenses.
1843. Pleading.
1844. Set-off—Cross-action.
1845. Evidence.
1846. Dismissal.
1847. Damages.
1848. Who liable.

ARTICLE II

GARNISHMENT

DIVISION I.—NATURE AND GROUNDS

1849. When authorized.
1850. Nature and purpose.
1851. After return of execution.

DIVISION II.—PERSONS AND PROPERTY SUBJECT

1852. Nonliability of garnishee—Judgment.
1853. Exemption from garnishment.
1854. Contractual interest—Judgments—Plaintiff.
1855. Possession and ownership.
1856. Assignment.
1857. Partnership.

DIVISION III.—PROCEDURE

1858. Pleadings—Proceedings—Affidavit and bond—Interrogatories—Forms.
1859. Garnishee summons—Form.
1860. Service—Appearance.
1861. Subsequent affidavits and summons.
1862. Answer or affidavit of garnishee—Form.
1863. By whom made.
1864. Time of corporation to answer.
1865. Issues and trial.
1866. Payment into court.
1867. Default of garnishee—Judgment—Contempt.
1868. Judgment.

DIVISION IV.—OPERATION AND EFFECT

1869. Liability of garnishee.
1870. Lien—Priority.
1871. Defenses—Exemption—Judgments.
1872. Action by defendant against garnishee.
1873. Costs.
1874. Injunction.

DIVISION V.—DISCHARGE OF GARNISHMENT

1875. Grounds—Motion—Form.
1876. Bond releasing garnishment—Form—Exceptions.

Sections

DIVISION VI.—CLAIMS BY THIRD PERSONS

1877. Disclosure by garnishee—Order—Notice—Default.
1878. Action by claimant.

DIVISION VII.—WRONGFUL GARNISHMENT

1879. Grounds of liability.
1880. Measure of damages.

ARTICLE III

RECEIVERS

1881. Grounds and occasion for receivership.
1882. Particular instances.
1883. Corporations—Involuntary dissolution.
1884. Petition—Form.
1885. Parties.
1886. Jurisdiction.
1887. Notice—Order—Forms.
1888. Eligibility.
1889. Oath and bond—Forms.
1890. Liability on bond.
1891. Objections—Waiver—Collateral attack.
1892. Contempt—Interference with receiver.
1893. Vacation of order—Supreme Court—Form.
1894. Powers.
1895. Title and custody of property.
1896. Liens.
1897. Disposition of litigated property—Order—Form.
1898. Existing contracts.
1899. Investment of funds—Application—Order—Forms.
1900. Receiver's sales.
1901. Distribution and disposition.
1902. Receivership expenses.
1903. Taxes.
1904. Compensation.
1905. Appeals.
1906. Actions by and against receivers.
1907. Liability of plaintiff and third persons.
1908. Additional forms.

ARTICLE IV

REFERENCE

1909. Reference by consent—Stipulation—Form.
1910. Upon application or court's motion—Order—Form.
1911. Reference in vacation.
1912. Referee—Appointment, qualification, and compensation—Order—Oath—Forms.
1913. Trial—Reports—Exceptions—Forms.
1914. Review by court.
1915. New trial.

ARTICLE V

LIS PENDENS

Sections
1916. Theory of lis pendens.
1917. Notice of action.
1918. Jurisdiction.
1919. Pendency of action.
1920. Amendment.
1921. Transfers pending suit.
1922. Unrecorded deeds.
1923. Persons bound by decree.

VOLUME III

CHAPTER XXVI

PROCEEDINGS IN EQUITY

1924–1926. Article I.—Equitable remedies in general.
1927–1970. Article II.—Divorce and alimony.
1927–1934. Division I.—Grounds.
1935–1937. Division II.—Defenses.
1938–1949. Division III.—Jurisdiction and procedure.
1950–1963. Division IV.—Awards.
1964–1970. Division V.—Custody and support of children.
1971–1983. Article III.—Quieting title.
1971–1974. Division I.—Right of action and defenses.
1975–1980. Division II.—Proceedings and relief.
1981–1983. Division III.—Government land.
1984–1999. Article IV.—Specific performance.
1984–1987. Division I.—Grounds, nature of action, and defenses.
1988–1999. Division II.—Enforceable contracts and enforcement of same.
2000–2030. Article V.—Partition.
2000–2003. Division I.—Right of action.
2004–2020. Division II.—Proceedings and relief.
2021–2030. Division III.—Partition in county court.
2031–2079. Article VI.—Injunction.
2031–2038. Division I.—Nature and grounds.
2039–2055. Division II.—Subjects and relief.
2056–2066. Division III.—Restraining order and temporary injunction.
2067–2071. Division IV.—Contempt.
2072–2079. Division V.—Liability on bonds.
2080–2097. Article VII.—Foreclosure.

ARTICLE I

EQUITABLE REMEDIES IN GENERAL

Sections
1924. Maxims, principles, and application.
1925. Remedies.
1926. Laches.

ARTICLE II

DIVORCE AND ALIMONY

Division I.—Grounds

1927. Enumeration of grounds.
1928. Abandonment.
1929. Pregnancy before marriage—Impotency.
1930. Cruelty.
1931. Fraudulent contract.
1932. Habitual drunkenness.
1933. Neglect of duty.
1934. Marriage of incompetents voidable.

Division II.—Defenses

1935. Insanity.
1936. Condonation.
1937. Res judicata.

Division III.—Jurisdiction and Procedure

1938. Residence.
1939. Separate domicile.
1940. Domicile to obtain a divorce.
1941. Petition—Summons or notice—Forms.
1942. Answer—Form.
1943. Default.
1944. Evidence.
1945. Appeal—Remarriage.
1946. Decree—Contents—Form.
1947. Vacation and modification—Motions—Orders—Forms.
1948. Collateral attack.
1949. Effect.

Division IV.—Awards

1950. Where divorce refused.
1951. Jurisdiction of person and property.
1952. Orders—Forms.
1953. Restraining order—Form.
1954. Temporary alimony and expenses—Form.
1955. Permanent alimony and division of property.
1956. Without divorce.
1957. Amount.
1958. Modification of decree.
1959. Release of obligation.
1960. Agreements of parties.
1961. Disposition of property.

Sections
1962. Construction and effect of decree.
1963. Fraudulent conveyances.

DIVISION V.—CUSTODY AND SUPPORT OF CHILDREN

1964. Jurisdiction.
1965. Decree—Form—Grounds.
1966. Effect.
1967. Modification.
1968. Enforcement.
1969. Award as to support.
1970. Support where no provision decreed.

ARTICLE III

QUIETING TITLE

DIVISION I.—RIGHT OF ACTION AND DEFENSES

1971. Possession—Nature of action.
1972. Cloud on title.
1973. Title to support action.
1974. Defenses.

DIVISION II.—PROCEEDINGS AND RELIEF

1975. Petition—Form.
1976. Cotenants.
1977. Answer—Disclaimer—Forms.
1978. Reply.
1979. Parties.
1980. Decree—Form.

DIVISION III.—GOVERNMENT LAND

1981. Patent erroneously issued.
1982. Actions.
1983. Hearing and findings.

ARTICLE IV

SPECIFIC PERFORMANCE

DIVISION I.—GROUNDS, NATURE OF ACTION, AND DEFENSES

1984. Grounds of relief.
1985. Nature of action.
1986. Discretion of court.
1987. Defenses.

DIVISION II.—ENFORCEABLE CONTRACTS AND ENFORCEMENT OF SAME

1988. Requisites and validity.
1989. Mutual obligations.
1990. Consideration.
1991. Oral contracts—Statute of frauds.
1992. Fraud—Illegal contracts.

Sections
1993. Options.
1994. Rescission or abandonment.
1995. Real property—Tender—Delay.
1996. Laches.
1997. Contracts to devise.
1998. Personal services.
1999. Performance before trial.

ARTICLE V

PARTITION

Division I.—Right of Action

2000. Property subject to partition.
2001. Possession and cotenancy.
2002. Agreements.
2003. Conditions precedent.

Division II.—Proceedings and Relief

2004. Jurisdiction.
2005. Parties.
2006. Pleadings—Forms.
2007. Order for partition—Form.
2008. Commissioners.
2009. Allotment of portions.
2010. Duty—Report—Form.
2011. Final decree—Form.
2012. Taking land at appraised value—Form.
2013. Sale—Order—Form.
2014. Return and deed—Forms.
2015. Confirmation of Sale—Form.
2016. Costs, fees, and expenses.
2017. Extent of court's power—Additional relief and orders.
2018. Taxes, rent, and incumbrances.
2019. Proceeds.
2020. Lis pendens.

Division III.—Partition in County Court

2021. Common estate—Commissioners.
2022. Petition, parties, and notice.
2023. Realty in different counties.
2024. Notice—Steps by commissioners.
2025. Division of property.
2026. Assignment to one owner.
2027. Sale of estate.
2028. Report of proceedings.
2029. Assignment of residue.
2030. Advancements.

ARTICLE VI

INJUNCTION

Division I.—Nature and Grounds

Sections
2031. Nature of remedy—Writ.
2032. Anticipated violation of right.
2033. Substantial injury.
2034. Defenses—Laches.
2035. Res judicata.
2036. Past wrongs.
2037. Adequate remedy at law.
2038. Mandatory injunction.

Division II.—Subjects and Relief

2039. Tax and nuisance.
2040. Civil actions.
2041. Miscellaneous proceedings.
2042. Property and conveyances.
2043. Trespass.
2044. Public lands.
2045. Contracts.
2046. Sale of good will.
2047. Corporations.
2048. Public officers.
2049. Elections.
2050. Enforcement of ordinances.
2051. Public safety.
2052. Criminal acts and prosecutions.
2053. Infringement.
2054. Board of arbitration.
2055. Final decree.

Division III.—Restraining Order and Temporary Injunction

2056. Notice.
2057. Restraining order—Form.
2058. Temporary injunction—Grounds—Form.
2059. Bond—Form.
2060. Affidavits.
2061. Vacating or modifying—Motions—Decrees—Forms.
2062. Operation of orders.
2063. Defendant may obtain injunction.
2064. Objections.
2065. Order of injunction—Service—Form.
2066. Effective when.

Division IV.—Contempt

2067. Disobedience of injunction.
2068. Jurisdiction to punish.
2069. Proceedings.
2070. Acts constituting violation.
2071. Defenses.

DIVISION V.—LIABILITY ON BONDS

Sections
2072. In general.
2073. Extent of liability.
2074. Actions—Conditions precedent.
2075. Time for suing.
2076. Pleading—Forms.
2077. Defenses.
2078. Evidence.
2079. Damages.

ARTICLE VII

FORECLOSURE

2080. Real estate mortgage.
2081. Security deed.
2082. Appraisement.
2083. Right of redemption.
2084. Chattel mortgages.
2085. Notice—Form.
2086. Sale.
2087. Attorneys' fees.
2088. Pledges.
2089. Liens against railroads.
2090. Mechanics' and materialmen's liens.
2091. Parties to action.
2092. Consolidation.
2093. Judgment—Sale.
2094. Costs—Attorney fees.
2095. Action by owner—When.
2096. Lien claimants to share pro rata.
2097. Liens—Oil and gas property—Rent—Crops.

CHAPTER XXVII

SPECIAL WRITS

2098–2158. Article I.—Habeas corpus.
2098–2118. Division I.—Theory and purpose.
2119–2158. Division II.—Jurisdiction, proceedings, and relief.
2159–2237. Article II.—Mandamus.
2159–2173. Division I.—Nature and grounds.
2174–2213. Division II.—Subjects of relief.
2214–2237. Division III.—Procedure.
2238–2239. Article III.—Certiorari.
2240–2252. Article IV.—Prohibition.
2240–2245. Division I.—Nature and grounds.
2246–2252. Division II.—Procedure.
2253–2274. Article V.—Quo warranto.
2253–2262. Division I.—Nature and grounds.
2263–2274. Division II.—Procedure.

ARTICLE I

HABEAS CORPUS

Division I.—Theory and Purpose

Sections
2098. Nature of writ.
2099. A constitutional right.
2100. Other remedies.
2101. Appeal or error.
2102. Nature of detention.
2103. Voluntary surrender.
2104. Authority for detention.
2105. Proceedings reviewable—Pardons.
2106. Arrest and commitment.
2107. Bail for murder when preliminary hearing was waived.
2108. Judgment and commitment.
2109. Grounds for issuance—In general.
2110. Want of jurisdiction or authority.
2111. Void proceedings.
2112. Irregularities.
2113. Former jeopardy.
2114. Void statute or ordinance.
2115. Excessive bail.
2116. Who entitled to relief.
2117. In whose favor granted.
2118. Habeas corpus never suspended.

Division II.—Jurisdiction, Proceedings, and Relief

2119. Jurisdiction—In general.
2120. When in custody of other court or officers.
2121. Of judges and judicial officers.
2122. Jurisdiction of parties.
2123. Waiver.
2124. Application—Contents—Form.
2125. Sufficiency of petition.
2126. Security for costs not required.
2127. Dismissal—Motion to dismiss.
2128. Warrant for prisoner—Form.
2129. Execution.
2130. Writ may issue to admit prisoner to bail.
2131. Hearing on application.
2132. Writ—Contents—Form.
2133. Delivery of writ.
2134. Service.
2135. On Sunday.
2136. Vacating writ.
2137. Return.
2138. Requisites of return—Form.
2139. Failure to make return.
2140. Exception to return.
2141. Evidence.

Sections
2142. Hearing on writ or return.
2143. Scope of inquiry and power of court.
2144. Jurisdiction.
2145. Compel attendance of witnesses.
2146. Sufficiency of evidence.
2147. Extradition.
2148. Irregularity.
2149. Determination of particular issues—Custody of infant.
2150. Commitment for contempt.
2151. Reduction of bail.
2152. Disposition of person.
2153. Discharge—Notice.
2154. Appeal.
2155. Effect of determination.
2156. Effect of refusal to discharge.
2157. Liability of officer for obeying writ.
2158. Constitutional provisions.

ARTICLE II

MANDAMUS

Division I.—Nature and Grounds

2159. Nature of writ.
2160. By whom issued—Who subject to writ.
2161. Existence of remedy at law.
2162. Appeal or error.
2163. Where other proceedings are pending.
2164. Discretion of court.
2165. Joinder of proceedings.
2166. Successive applications.
2167. Nature of rights to be protected.
2168. What acts commanded.
2169. Demand of performance.
2170. Defenses.
2171. Mandamus useless.
2172. Abatement.
2173. Who entitled to relief.

Division II.—Subjects of Relief

2174. Exercise of judicial powers and discretion.
2175. When disqualified.
2176. Acts in violation of law.
2177. Proceeding with cause—Dismissal.
2178. Injunction.
2179. Trial by jury.
2180. Entry of order.
2181. Vacation of order.
2182. Execution—Judicial sale.
2183. Proceedings for review.
2184. Enforcement of mandate on review.
2185. Taxation of costs.

Sections
2186. Criminal proceedings.
2187. Officers subject to mandamus.
2188. State officers and boards.
2189. Ministerial acts.
2190. Exercise of discretion.
2191. Specific acts.
2192. Elections.
2193. Appointment or recall of public officers.
2194. Title to office—Possession.
2195. Establishment of schools.
2196. Public records.
2197. Contracts.
2198. Franchise.
2199. Grant of licenses.
2200. Maintenance and repair of public bridges.
2201. Levy of taxes.
2202. Audit and allowance of accounts.
2203. Issue of warrants and bonds.
2204. Payment of warrants.
2205. Payment of judgments.
2206. Levy of taxes to pay bonds and interest.
2207. Payment of judgments.
2208. Assessment of taxes.
2209. Payment of taxes.
2210. Meetings of corporations.
2211. Corporate franchises—Construction of works.
2212. Operation of works.
2213. Individuals.

DIVISION III.—PROCEDURE

2214. Jurisdiction.
2215. Time to sue.
2216. Parties plaintiff—In name of state.
2217. Defendants.
2218. Pleadings.
2219. Motion or application—Affidavit—Notice—Forms.
2220. Disqualification of judge.
2221. In Supreme Court.
2222. Writ of mandamus—Contents—Forms.
2223. Peremptory writ.
2224. Issuance and service.
2225. Answer or return.
2226. Motion to quash construed as answer.
2227. Demurrer.
2228. Cross-petition.
2229. Demurrer to answer or return.
2230. Dismissal before hearing.
2231. Conduct of trial.
2232. Evidence.
2233. Scope of inquiry.
2234. Extent of relief.
2235. Damages bar to action.

Sections
2236. Punishment for contempt—Penalty.
2237. Appeal and error.

ARTICLE III

CERTIORARI

2238. Nature and office of writ.
2239. When issued—Review—Form.

ARTICLE IV

PROHIBITION

DIVISION I.—NATURE AND GROUNDS

2240. Nature of remedy.
2241. Existence of other remedies.
2242. Proceedings of courts and judges.
2243. Of public officers and boards.
2244. Grounds for relief.
2245. Prohibition not beneficial—Abatement.

DIVISION II.—PROCEDURE

2246. Jurisdiction.
2247. Objections in lower court.
2248. Parties.
2249. Scope of inquiry.
2250. Appeal.
2251. Dismissal.
2252. Forms.

ARTICLE V

QUO WARRANTO

DIVISION I.—NATURE AND GROUNDS

2253. Nature of writ.
2254. Writ abolished—Civil action.
2255. Statutory grounds.
2256. Existence of municipality—School district organization.
2257. Exercise of corporate franchise.
2258. Trial of title to office—Usurpation.
2259. Forfeiture and maladministration.
2260. Adequate remedy at law.
2261. Discretion of court.
2262. Defenses.

DIVISION II.—PROCEDURE

2263. Venue.
2264. Parties plaintiff.
2265. Control of proceedings.
2266. Parties defendant.
2267. Petition—Contents—Form.
2268. Answer.

Sections
2269. Evidence.
2270. Powers of court—Inquiry.
2271. Judgment—Form.
2272. In contest for office.
2273. Costs.
2274. In action against corporations.

CHAPTER XXVIII

SPECIAL PROCEEDINGS

2275–2283. Article I.—Dissolution proceedings.
2284–2294. Article II.—Determination of heirship.
2295–2299. Article III.—Homestead and marital rights.
2300. Article IV.—Adoption and bastardy.
2301–2306. Article V.—Contempt.
2307–2317. Article VI.—Seizure, confiscation, and forfeiture.
2318–2338. Article VII.—Condemnation proceedings.
2339–2352. Article VIII.—Restoration of records.
2353–2358. Article IX.—Occupying claimants.
2359–2360. Article X.—Escheat.
2361–2367. Article XI.—Libel and slander.

ARTICLE I

DISSOLUTION PROCEEDINGS

2275. Dissolution of corporation
2276. Voluntary.
2277. Involuntary.
2278. Who may bring action.
2279. Not duly incorporated.
2280. Elections.
2281. Dissolution of insurance companies.
2282. Dissolution of partnership.
2283. Forms.

ARTICLE II

DETERMINATION OF HEIRSHIP

2284. Jurisdiction—Appeals.
2285. Petition—Who may file—Contents.
2286. Hearing—Notice—Service.
2287. Trial—Judgment—Rehearings.
2288. Appeals—How taken.
2289. Method not exclusive.
2290. Invoking jurisdiction in action relating to real property.
2291. Judgment—Findings.
2292. Judgment—Conclusiveness.
2293. Service by publication.
2294. Proof of service.

ARTICLE III

HOMESTEAD AND MARITAL RIGHTS

Sections
2295. Husband and wife.
2296. Effect of proceedings.
2297. Setting aside decree.
2298. Homestead—Insane spouse.
2299. Service of petition.

ARTICLE IV

ADOPTION AND BASTARDY

2300. Adoption—Bastardy—Delinquent children—Majority rights.

ARTICLE V

CONTEMPT

2301. Hearing—Jury trial.
2302. Evidence—Application.
2303. Alimony, support, and suit money.
2304. Corporation commission—Appeal.
2305. Burden of proof.
2306. Injunction against liquor nuisance.

ARTICLE VI

SEIZURE, CONFISCATION AND FORFEITURE

2307. Forfeiture of property used in violation of prohibitory laws.
2308. Searches.
2309. Vehicles.
2310. Automobiles.
2311. Beer.
2312. Procedure.
2313. Appeals allowed.
2314. Jurisdiction.
2315. Complaint.
2316. Interplea.
2317. Gambling apparatus.

ARTICLE VII

CONDEMNATION PROCEEDINGS

2318. Condemnation proceedings—Railroads.
2319. Compensation to owner.
2320. Report—Review—Jury trial.
2321. Appeal—Condemnation proceedings.

Sections
2322. Application of law.
2323. Eminent domain—Oil pipe line companies.
2324. Foreign corporations may not exercise eminent domain.
2325. Condemnation proceedings—Parties entitled to prosecute.
2326. Special proceedings—Eminent domain—Lands subject.
2327. Procedure—Appeal.
2328. Pipe line companies.
2329. Water power companies.
2330. Municipalities.
2331. Other persons.
2332. Acquisition by United States.
2333. Light, heat, and power companies.
2334. Establishment of roads by county commissioners.
2335. Landowner may start proceedings.
2336. Trial and evidence.
2337. Effect of condemnation—Damages.
2338. Condemnation of Indian lands.

ARTICLE VIII

RESTORATION OF RECORDS

2339. Restoration by certified copy.
2340. Restoration where no certified copy is to be had.
2341. Restoration of probate records.
2342. Restoration of record in cases appealed.
2343. County records.
2344. Plats to be restored by court action.
2345. An interested individual may petition—Form.
2346. Duties of county commissioners.
2347. Abstract records may be used.
2348. Courts may act to establish title.
2349. Effect of court decree—Form.
2350. Certified copy of deed may be recorded.
2351. Power to act may be in legal representative.
2352. Admissibility of oral and other evidence.

ARTICLE IX

OCCUPYING CLAIMANTS

2353. Reimbursement for improvements and expenditures.
2354. Trial and appraisement.
2355. Judgment—Appeal.
2356. Purchase by occupant.
2357. Refunding purchase money.
2358. Where ejectment brought.

ARTICLE X

ESCHEAT

2359. When property escheats.
2360. Escheat proceedings, how instituted and carried on.

ARTICLE XI

LIBEL AND SLANDER

Sections
2361. Libel defined.
2362. Slander defined.
2363. Privileged communication defined.
2364. Pleading—Proof and defenses.
2365. Extent of liability.
2366. Malice presumed.
2367. Minimum judgment.

CHAPTER XXIX

APPEAL AND REVIEW

2368–2370. Article I.—Origin, right, and mode of appeal.
2371–2373. Article II.—Appellate jurisdiction.
2374–2379. Article III.—Decisions reviewable.
2380–2383. Article IV.—Right of appeal.
2387–2418. Article V.—Presentation below.
2419–2422. Article VI.—Parties.
2423–2431. Article VII.—Manner of taking appeal.
2423–2425. Division I.—Time of taking appeal.
2426–2427. Division II.—Deposit and bond.
2428–2431. Division III.—Notice, petition in error, and appearance.
2432–2436. Article VIII.—Effect of appeal, supersedeas and stay.
2437–2464. Article IX.—Transcript and case-made.
2437–2440. Division I.—Record in general.
2441–2444. Division II.—Transcript.
2445–2464. Division III.—Case-made.
2465–2468. Article X.—Assignment of errors.
2469–2475. Article XI.—Briefs.
2476–2485. Article XII.—Dismissal and abandonment.
2486–2489. Article XIII.—Hearing and rehearing.
2490–2544. Article XIV.—Review.
2490–2499. Division I.—Scope and extent.
2500. Division II.—Rulings.
2501–2502. Division III.—Parties entitled to complain.
2503–2505. Division IV.—Amendments and additional proof.
2506–2515. Division V.—Presumptions.
2516–2521. Division VI.—Discretionary rulings.
2522–2524. Division VII.—Evidence, verdict and findings.
2525–2540. Division VIII.—Harmless error.
2541. Division IX.—Waiver of error.
2542–2544. Division X.—Intermediate and subsequent appeals.
2545–2556. Article XV.—Decision.
2557–2562. Article XVI.—Bonds.
2563. Article XVII.—Rules of Supreme Court.

ARTICLE I

ORIGIN, RIGHT, AND MODE OF APPEAL

Sections
2368. Origin and right of appeal.
2369. Cross-appeals and successive appeals.
2370. Consolidation for appeal.

ARTICLE II

APPELLATE JURISDICTION

2371. Powers of court.
2372. Basis of jurisdiction.
2373. Existence of controversy.

ARTICLE III

DECISIONS REVIEWABLE

2374. Final orders.
2375. New trial.
2376. Receivers.
2377. Temporary injunctions.
2378. Pleadings.
2379. Amount in controversy.

ARTICLE IV

RIGHT OF APPEAL

2380. Persons entitled.
2381. Waiver of appeal.
2382. By compliance with order or decree.
2383. Payment of judgment.
2384. Payment of costs.
2385. Acceptance of benefits.
2386. By selection of another remedy.

ARTICLE V

PRESENTATION BELOW

2387. Issues in lower court.
2388. Sufficiency of presentation.
2389. Objections and rulings—Venue—Parties—Process—Clerk.
2390. Jurisdiction of lower court.
2391. Judge pro tem.
2392. Motions—Incidental proceedings—Attachments.
2393. Pleadings.
2394. Reference.

Sections
2395. Conduct of trial.
2396. Argument and conduct of counsel.
2397. Evidence and witnesses.
2398. Instructions.
2399. Sufficiency of court's findings.
2400. The verdict.
2401. Judgment.
2402. Report of referee.
2403. Appeals from justice court.
2404. Specific and general objections.
2405. Sufficiency of objection.
2406. Objection by motion—Necessity.
2407. Objection to judgment—Costs.
2408. Necessity for ruling.
2409. Exceptions.
2410. As to pleadings.
2411. Findings of jury, court, or referee.
2412. Judgment.
2413. Rulings after judgment.
2414. Sufficiency and effect—Withdrawal.
2415. Timeliness of objection and exception.
2416. Motion for new trial.
2417. Presentation of errors.
2418. Time.

ARTICLE VI

PARTIES

2419. Necessary parties.
2420. Rules.
2421. Death of party.
2422. Defect of parties.

ARTICLE VII

MANNER OF TAKING APPEAL

Division I.—Time of Taking Appeal

2423. Periods applicable.
2424. Time during which limitation runs.
2425. Extension of time—Dismissal.

Division II.—Deposit and Bond

2426. Deposit for costs.
2427. Bond.

Division III.—Notice, Petition in Error, and Appearance.

2428. Notice of appeal in open court.
2429. Petition in error.
2430. Assignment of errors.
2431. Appearance.

ARTICLE VIII

EFFECT OF APPEAL, SUPERSEDEAS, AND STAY

Sections
2432. Suspension of jurisdiction below.
2433. Collateral matters.
2434. Undertaking for stay—Form.
2435. Stay pending appeal.
2436. Inherent power to grant stay.

ARTICLE IX

TRANSCRIPT AND CASE-MADE

Division I.—Record in General

2437. Necessity and requisites.
2438. Presentation for review.
2439. Conclusiveness of record.
2440. Conflicts.

Division II.—Transcript

2441. Contents.
2442. Matters presented for review.
2443. Requisites and sufficiency.
2444. Certificate.

Division III.—Case-Made

2445. Function and necessity.
2446. Attached to petition—Complete record—Costs.
2447. Service, amendment, settlement, and filing—Exceptions.
2448. Attestation—Filing.
2449. Extension of time—Motion—Order—Forms.
2450. Service.
2451. Parties served.
2452. Contents.
2453. Form and sufficiency.
2454. Amendments.
2455. Settlement and certification.
2456. Time for settlement.
2457. Notice.
2458. Death, expiration of term, or absence of trial judge.
2459. Special judge—Appellate court.
2460. Filing in both courts.
2461. Correction—Notice.
2462. Waiver of defects.
2463. Conclusiveness of certificate.
2464. Matters presented for review.

ARTICLE X

ASSIGNMENT OF ERRORS

Sections
2465. Necessity.
2466. Requisites and sufficiency.
2467. Matters presented for review.
2468. Amendment.

ARTICLE XI

BRIEFS

2469. Necessity.
2470. Form and requisites.
2471. Specification of errors.
2472. Argument.
2473. Defective briefs.
2474. Failure to file and serve.
2475. Disposition of appeal.

ARTICLE XII

DISMISSAL AND ABANDONMENT

2476. Voluntary dismissal.
2477. Involuntary dismissal.
2478. Moot questions.
2479. Defects in proceedings.
2480. Frivolous appeals.
2481. Failure to prosecute appeal.
2482. Dismissal by court on its own motion.
2483. Motion for dismissal.
2484. Abandonment.
2485. Vacating order of dismissal and reinstatement.

ARTICLE XIII

HEARING AND REHEARING

2486. Advancement—Continuance.
2487. Rehearing.
2488. Petition—Form.
2489. Matters considered.

ARTICLE XIV

REVIEW

Division I.—Scope and Extent

2490. Scope in general.
2491. Consideration of evidence.
2492. Agreed statement.

Sections
2493. Questions of law and of fact.
2494. Abstract and hypothetical questions.
2495. In equity case.
2496. Special findings.
2497. Theory adopted below.
2498. Reason for decision.
2499. Dependent on nature of decision.

DIVISION II.—RULINGS

2500. On pleadings and motions.

DIVISION III.—PARTIES ENTITLED TO COMPLAIN

2501. In general.
2502. Invited error, estoppel, and waiver.

DIVISION IV.—AMENDMENTS AND ADDITIONAL PROOF

2503. Remanding for amendment.
2504. Amendment regarded as made in lower court.
2505. Additional proofs in appellate court.

DIVISION V.—PRESUMPTIONS

2506. Burden of showing error.
2507. Jurisdiction and organization of lower court.
2508. Judgment and verdict.
2509. Findings.
2510. Pleadings.
2511. Motions and orders.
2512. Reference.
2513. Dismissal, demurrer to evidence, and direction of verdict.
2514. Instructions.
2515. Case-made.

DIVISION VI.—DISCRETIONARY RULINGS

2516. In general.
2517. Motions and pleading.
2518. New trial.
2519. Reception of evidence and examination of witnesses.
2520. Submission of issues.
2521. Judgment, execution, and sale.

DIVISION VII.—EVIDENCE, VERDICT AND FINDINGS

2522. Evidence and witnesses.
2523. Verdicts.
2524. Findings.

DIVISION VIII.—HARMLESS ERROR

2525. Errors not affecting substantial right.
2526. Errors not affecting result.
2527. Where judgment correct.
2528. Presumption and prejudice.

Sections
2529. Pleadings.
2530. Interlocutory proceedings.
2531. Jury and trial.
2532. Evidence.
2533. Statements and conduct of counsel.
2534. Cure of error.
2535. Demurrer to evidence and direction of verdict.
2536. Submission of issues and instructions.
2537. Cure of error.
2538. Conduct of the jurors.
2539. Findings.
2540. Judgment.

DIVISION IX.—WAIVER OF ERROR

2541. Express and implied waiver.

DIVISION X.—INTERMEDIATE AND SUBSEQUENT APPEALS

2542. Intermediate courts—Cases from justice court
2543. Cases from county court.
2544. Subsequent appeals.

ARTICLE XV

DECISION

2545. Decision in general.
2546. Affirmance.
2547. Modification.
2548. Reversal.
2549. Mandate.
2550. Direction of judgment.
2551. New trial.
2552. Proceedings in lower court.
2553. Powers and duties.
2554. Amendments.
2555. Disposition of property.
2556. Jurisdiction of appellate court after remand.

ARTICLE XVI

BONDS

2557. Liability on bonds.
2558. Action on appeal or supersedeas bond.
2559. Void or defective appeal.
2560. Accrual or release of liability.
2561. Enforcement of liability.
2562. Extent of liability.

ARTICLE XVII

RULES OF SUPREME COURT

Sections
2563. Rules stated.

TABLE OF STATUTES CITED

(Page 2557)

TABLE OF CONSTITUTIONAL PROVISIONS CITED

(Page 2569)

TABLE OF CASES CITED

(Page 2571)

INDEX

(Page 2715)

A TREATISE

ON

PLEADING AND PRACTICE

IN COURTS OF RECORD IN CIVIL CASES IN THE STATE OF OKLAHOMA

CHAPTER I

COURTS AND COURT OFFICERS

Sections
1–142. Article I.—Courts and judges.
1–31. Division I.—Relating to code practice in general.
32–45. Division II.—Judges in general.
46–81. Division III.—District courts and judges.
82–89. Division IV.—Superior courts and judges.
90–113. Division V.—County courts and judges.
114–142. Division VI.—Supreme Court and judges.
143–198. Article II.—Other court officers.
143–145. Division I.—In general.
146–162. Division II.—Court clerks.
163–172. Division III.—Sheriffs and other peace officers.
173–198. Division IV.—Attorneys.

ARTICLE I

COURTS AND JUDGES

DIVISION I.—RELATING TO CODE PRACTICE IN GENERAL

Sections
1. Courts open for administration of justice.
2. Due process.
3. Judicial power vested where.
4. Judges—Conservators of the peace.
5. Title of chapter.
6. Prior decisions and precedents—Stare decisis.
7. Decisions of federal courts.
8. Common law.
9. Obiter dictum.
10. Law of the case.
11. Statutes and construction.
12. Erroneous words and punctuation.
13. Rule of ejusdem generis.
14. Statute construed as a whole.
15. Statutes construed together or in the light of each other.
16. Administrative construction.
17. Provisos or exceptions.
18. Statute adopted from another state.
19. Adjournment by sheriff.
20. Publications.
21. Affirmation.
22. Computation of time.
23. Surety—Justification.
24. Qualifications.
25. Real estate mortgage as bond.
26. Valuation of real estate.
27. False valuation—Penalty.

Sections
28. Action on bond.
29. Several actions on security.
30. Submission of controversy.
31. Impeachment and removal from office.

DIVISION II.—JUDGES IN GENERAL

32. As public officer.
33. Judge pro tempore.
34. Waiver of objections.
35. Powers of special judges.
36. Liabilities.
37. Change of judge.
38. Disqualifications.
39. Relationship.
40. Bias and prejudice.
41. Objections and procedure.
42. Form—Application for disqualification of judge.
43. Waiver of disqualifications.
44. Acts of disqualified judge.
45. Powers at chambers.

DIVISION III.—DISTRICT COURTS AND JUDGES

46. District court—Where held.
47. Districts and judges.
48. Sessions—Time for—Adjournments.
49. Change of district—Disposition of cases pending.
50. Special terms.
51. Adjournment of term.
52. Two or more judges sitting at same time.
53. Additional judge.
54. District judges—Expenses.
55. Reporter—Appointment—Qualifications.
56. Duties of court reporter.
57. Salary and fees.
58. Traveling expenses.
59. Tenure and oath of office.
60. Notes filed—Admissibility in evidence—Transcripts.
61. Appeal to district court.
62. Party in default.
63. Who may appeal.
64. When appeal must be taken.
65. Appeal how taken.
66. Appeal bond.
67. Stay of execution.
68. Commitment—How stayed.
69. Justification of sureties—Increased bond.
70. Appeal bond form—Action upon.
71. Appeal not to stay issue of letters.
72. Appeal not to stay order revoking letters, etc.
73. Proceedings.
74. Powers of the appellate court.

Sections
75. Trial de novo.
76. Penalty for neglect of county judge to transmit record.
77. Dismissal of appeal—Effect—Costs.
78. Enforcement of decree.
79. Executor's bond stands in place of appeal bond.
80. Reversal for error not to affect lawful acts.
81. Rules of district court.

DIVISION IV.—SUPERIOR COURTS AND JUDGES

82. Superior courts in general.
83. Qualifications of judges—Term of office.
84. Election.
85. Procedure—Juries—Appeals.
86. Court stenographer.
87. Sheriffs—County attorneys.
88. Judge's salary.
89. Transfer of causes.

DIVISION V.—COUNTY COURTS AND JUDGES

90. Procedure—Seal.
91. Terms of court.
92. Proceedings in vacation—Out of court.
93. Calendar.
94. Stenographer.
95. Duties.
96. Oath and tenure of office.
97. Fees for making transcripts.
98. Ex officio court clerk.
99. Compensation.
100. Fees—Record.
101. Report of.
102. Fees paid to treasurer.
103. Special court towns.
104. Judge—Term of office—Qualification.
105. To give bond.
106. Office and records.
107. Practice prohibited.
108. Temporary county judge.
109. How elected.
110. Fee when affidavit of bias made.
111. County judge—County attorney—Salary.
112. Court reporters.
113. Rules for county court.

DIVISION VI.—SUPREME COURT AND JUDGES

114. Membership—Quorum—Eligibility—Term of office—Vacancies—Jurisdiction.
115. Justices—Judicial districts—Election—Law clerks.
116. Referees and first law clerk.
117. Chief justice—Election.
118. Vice chief justice—Election.

Sections
119. Justices—Not to be candidate for other office.
120. Commencement of term.
121. Sessions—Opinions.
122. Chief justice—Expiration of terms—Election.
123. Clerk.
124. Law governing.
125. Salaries of justices.
126. Effect of invalidity.
127. Jurisdiction—Divisions.
128. Appeals from county court.
129. Appeals from corporation commission.
130. Appeals from state labor commission.
131. Formation of new counties.
132. Speedy hearing.
133. Original jurisdiction—Division of assets and liabilities among counties.
134. Parties—Proceedings.
135. Constitution.
136. Jurisdiction—Removal of state capital and normal schools.
137. Jury trial when.
138. Trial.
139. Jury—How selected.
140. Costs—Witness fees.
141. Reports.
142. Supreme court rules.

Division I.—Relating to Code Practice in General

§ 1. Courts open for administration of justice

"The courts of justice of the state shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."[1]

This provision is self-executing,[2] and prohibits the trial of any cause by a judge or juror prejudiced against either party. Prohibitive clauses of a Constitution are always self-executing and require no legislative provision for their enforcement.[3] This clause expressly requires that courts grant relief in a speedy manner. It does not, however, require a jury trial in proceedings under the Workmen's Compensation Act (Laws 1915, c. 246),[4] or in a pro-

[1] Const. Okl. art. 2, § 6.
[2] Mayes v. Pitchford, 26 Okl. 129, 109 P. 821.
[3] State ex rel. Smith v. Brown, 24 Okl. 433, 446, 103 P. 762; Ex parte Hudson, 3 Okl. Cr. 393, 106 P. 540; Lewis v. Russell, 4 Okl. Cr. 129, 111 P. 818.
[4] Adams v. Iten Biscuit Co., 63 Okl. 52, 162 P. 938.

ceeding by the state before the corporation commission to recover a refund of excess rates,[5] nor does it give a party a right to a trial before a particular judge.[6]

§ 2. Due process

"No person shall be deprived of life, liberty, or property, without due process of law." [7]

This provision does not always require judicial hearings. It requires such hearings in matters of a purely judicial nature, but not in matters purely administrative, such as matters of taxation.[8] It requires only that a party shall have reasonable notice and opportunity to be heard.[9] That the trial court fails to follow the statute in taxing costs raises no question as to violation of the due process clause.[10]

A citizen has no property in a defense, and, while rights accrued to him under existing laws and which have thereby become vested may not be taken away by a change of rule, he cannot complain that he is denied due process of law, where a rule is changed before any rights have accrued to him thereunder.[11]

[5] Pioneer Telephone & Telegraph Co. v. State, 40 Okl. 417, 138 P. 1033.

[6] State v. Brown, 8 Okl. Cr. 40, 126 P. 245, Ann. Cas. 1914C, 394.

[7] Const. Okl. art. 2, § 7. Exercise by commissioner of land office of ministerial and judicial functions as to state school lands under Laws 1907–08, c. 49, art. 2, and Rev. Laws 1910, §§ 7177, 7186, 7187, is not a denial of "due process of law," either under Const. Amend. U. S. 14, or Const. Okl. art. 2, § 7. Wilhite v. Cruce (Okl.) 172 P. 962.

The equitable and common-law jurisdiction granted to the courts by the organic act of the territory of Oklahoma were a part of that due process of law which is guaranteed to every citizen as a protection of his life, liberty, and property. Smith v. Speed, 66 P. 511, 11 Okl. 95, 55 L. R. A. 402. The jurisdiction of the courts in equity as provided in the organic act of Oklahoma Territory is as much due process of law as the right of trial by jury in cases at common law. Id.

[8] Anderson v. Ritterbusch, 22 Okl. 761, 98 P. 1002; Anderson v. Ritterbusch, 98 P. 1002, 22 Okl. 761.

[9] Where a motion to vacate a decree of foreclosure and sale thereunder was made by the owner of the equity of redemption upon whom no valid service was had in the foreclosure proceeding, and the grantee of the purchaser at the foreclosure sale was served with notice of such motion, appeared and answered, filed an affidavit in opposition to the motion, and also a motion to dismiss the motion to vacate, actively conducted the defense, and appealed from the decree, a decree setting aside the judgment of foreclosure and permitting the owner of the equity of redemption to appear, plead, and set up her defense, did not deny to the grantee due process of law. Harding v. Gillett, 107 P. 665, 25 Okl. 199.

[10] Cramer v. Farmers' State Bank of Galva, 158 P. 1111, 98 Kan. 641.

[11] Dickinson v. Cole (Okl.) 177 P. 570.

Failure to give notice of an application for alimony pendente lite is not a deprivation of property without due process of law.[12]

Notice by publication, consisting of two successive insertions in a paper of general circulation in the county in which the land to be embraced within the boundaries of a drainage district is located, is sufficient to constitute due process of law.[13]

A judgment of the district court affirming the action of the county commissioners on a claim, without giving claimant a chance to be heard, would be a deprivation of property without due process.[14]

The statute providing that, if a foreign corporation doing business in the state fails to appoint an agent therein for service, service may be made on the secretary of state, is not a denial of due process of law.[15]

§ 3. Judicial power vested where

"The judicial power of this state shall be vested in the Senate, sitting as a court of impeachment, a Supreme Court, district courts, county courts, courts of justices of the peace, municipal courts, and such other courts, commissions or boards, inferior to the Supreme Court, as may be established by law." [16]

§ 4. Judges—Conservators of the peace

"All judges of courts of this state, and justices of the peace, shall, by virtue of their office, be conservators of the peace throughout the state." [17]

§ 5. Title of chapter

The chapter relating thereto shall be known as the Code of Civil Procedure of the state of Oklahoma.[18]

§ 6. Prior decisions and precedents—Stare decisis

Principles of public policy demand that a fixed construction of constitutional law should not be unsettled, unless clearly erro-

[12] Gundry v. Gundry, 68 P. 509, 11 Okl. 423.
[13] Riley v. Carrico, 110 P. 738, 27 Okl. 33.
[14] Cherokee County Pub. Co. v. Cherokee County, 48 Okl. 722, 151 P. 187.
[15] Title Guaranty & Surety Co. v. Slinker, 143 P. 41, 42 Okl. 811.
[16] Const. Okl. art. 7, § 1.
[17] Const. Okl. art. 7, § 19.
[18] Rev. Laws 1910, § 4641.

neous.[19] Where a series of decisions of a court of last resort have been acted upon as the proper interpretation of the law for a long time, they will not be interfered with, though the courts would decide otherwise were the question a new one.[20] But the doctrine of stare decisis does not preclude a departure from precedent established by a series of decisions clearly erroneous, unless property complications have resulted and a reversal would work a greater injury and injustice than would ensue by following the rule.[21]

The Supreme Court will give full consideration to authorities founded upon and supported by living principles, but will not recognize or follow precedents which have outlived their usefulness; when the reason for a rule ceases, the court will not enforce such rule.[22]

The construction of a statute in a civil proceeding is authority

[19] Anderson v. State, 123 P. 442, 7 Okl. Cr. 130.

[20] Inman v. Sherrill, 116 P. 426, 29 Okl. 100. Judicial decisions, acted on as settled rule of contract, are to be followed on the principle of stare decisis whether right or wrong. Lasiter v. Ferguson, 79 Okl. 200, 192 P. 197.

[21] Thurston v. Fritz, 138 P. 625, 91 Kan. 468, 50 L. R. A. (N. S.) 1167, Ann. Cas. 1915D, 212.

Rule of property.—A decision of the Supreme Court of the United States following the decisions of the Supreme Court of Illinois in construing "rules of property" in Illinois, is not applicable as a precedent to an Oklahoma contract, where the Oklahoma decisions are in conflict with those of Illinois. Hill Oil & Gas Co. v. White, 53 Okl. 748, 157 P. 710.

In an action to recover an Indian allotment, testimony of lawyers that the rule laid down by the United States Circuit Court of Appeals in a certain case had not been followed generally by the profession and trial judges held properly excluded on objection that it was incompetent and immaterial. McDougal v. McKay, 142 P. 987, 43 Okl. 261, judgment affirmed 35 S. Ct. 605, 237 U. S. 372, 59 L. Ed. 1001.

Though an act authorizing the vacation of town sites might be held unconstitutional if the question were a new one, but it had been held valid for many years and tracts of land have been fenced and farmed as rural lands, and voting places have been determined accordingly, and city finances and municipal affairs have been adjusted for years on the supposition that the law was constitutional, the doctrine of stare decisis, based on the necessity of stability in the interpretation of the law, applies, and the former decision will not be disturbed. Bull v. Kelley, 112 P. 133, 83 Kan. 597.

[22] Caples v. State, 104 P. 493, 3 Okl. Cr. 72, 26 L. R. A. (N. S.) 1033.

Though decision that poll tax law of 1911 did not apply to cities of first class was influenced by language in another statute, enacted at same session, repeal of such other statute will not change interpretation of poll tax law. City of Topeka v. Wasson, 101 Kan. 824, 168 P. 902.

for a like construction in a criminal prosecution.[23] It is the settled policy of the Supreme Court to follow the construction given to criminal statutes by the Criminal Court of Appeals.[24]

The Supreme Court of the state took and possesses any and all the jurisdiction of the Supreme Court of the territory, except as otherwise provided, and has the same power and right to re-examine a decision of that court, holding a territorial statute invalid, and to determine whether or not such act is invalid, and, if such decision is erroneous, to overrule it.[25]

Where the Legislature has, by legislative enactment, prescribed rules and regulations governing contracts and agreements relating to real estate, or any interest therein, such legislative enactment must govern, any decisions of other states, or territories, to the contrary, notwithstanding.[26]

The determination as to whether an instruction, abstractly correct, but inapplicable to the facts of the case was prejudicial will not ordinarily serve as a precedent for any other case.[27]

§ 7. —— Decisions of federal courts

Where an act of Congress which governs a contract has been construed by the Supreme Court of the United States, the decision of that court is supreme, and state courts are bound by it.[28]

In cases arising in state courts, involving rights and liabilities of parties to an interstate railroad shipment, the decisions of United

[23] State v. Coyle, 122 P. 243, 7 Okl. Cr. 50, rehearing denied 130 P. 316, 8 Okl. Cr. 686.

[24] State v. Russell, 124 P. 1092, 33 Okl. 141; Ex parte Anderson, 124 P. 980, 33 Okl. 216; Ex parte Lightle, 124 P. 983, 33 Okl. 223; Ex parte Rial, 124 P. 983, 33 Okl. 224; Ex parte Spurlock, 124 P. 983, 33 Okl. 225.

[25] State v. Chaney, 102 P. 133, 23 Okl. 788; Frick Co. v. Oats, 94 P. 682, 20 Okl. 473.

[26] McCormick v. Bonfils, 60 P. 296, 9 Okl. 605.

[27] Brownell v. Moorehead (Okl.) 165 P. 408.

[28] Missouri, K. & T. Ry. Co. v. Walston, 133 P. 42, 37 Okl. 517. The strict construction placed by the federal courts upon the act of Congress relative to extradition proceedings between states, is binding on state courts. Ex parte Owen, 136 P. 197, 10 Okl. Cr. 284, Ann. Cas. 1916A, 522.

The decisions of the United States Supreme Court holding valid the acts of Congress suspending for 21 years the interstate federal laws which would permit the introduction of intoxicating liquors as interstate commerce into the Indian territory are binding upon state courts. Huff v. State, 9 Okl. Cr. 675, 133 P. 265.

States Supreme Court, construing and applying the federal act, are controlling.[29]

In determining questions of federal cognizance, the state Supreme Court is bound by rules of decisions adjudicated in the Supreme Court of the United States.[30]

As to cases pending in the territorial courts in Indian Territory and Oklahoma Territory at the time of the erection of the state, decisions of the Supreme Court of the United States are controlling.[31]

§ 8. —— Common law

"The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object." [32]

This statute precludes the following of decisions based on the civil law as governing authority in this jurisdiction.[33] When the people came to Oklahoma from the different states in 1889, they

[29] St. Louis, I. M. & S. Ry. Co. v. Bentley (Okl.) 176 P. 250; St. Louis, I. M. & S. Ry. Co. v. Patterson, 75 Okl. 204, 182 P. 701; Atchison, T. & S. F. Ry. Co. v. Cooper (Okl.) 175 P. 539.

The several sections of the Act Cong. March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. §§ 8605–8612), making it unlawful for railroads engaged in interstate commerce to use cars not equipped with specified appliances, are framed upon the same general plan, and, notwithstanding any minor differences in their language, a declaration by the Supreme Court of the United States that one of them is intended to impose upon the railroad the absolute duty of keeping in good repair the equipment therein required, irrespective of any question of negligence, determines that a like interpretation is to be given to the others. Brinkmeier v. Missouri Pac. Ry. Co., 105 P. 221, 81 Kan. 101, judgment affirmed 32 S. Ct. 412, 224 U. S. 268, 56 L. Ed. 758.

[30] Miller v. State, 106 P. 810, 3 Okl. Cr. 457.

[31] Fidelity & Deposit Co. of Maryland v. Rankin, 124 P. 71, 33 Okl. 7; State Mut. Ins. Co. v. Craig, 111 P. 325, 27 Okl. 90; Missouri, K. & T. Ry. Co. v. Walker, 113 P. 907, 27 Okl. 849; Stanford v. National Drill & Mfg. Co., 114 P. 734, 28 Okl. 441; Sullivan v. Mercantile Town Mut. Ins. Co., 94 P. 676, 20 Okl. 460, 129 Am. St. Rep. 761.

[32] Rev. Laws 1910, § 4642.

[33] Chicago, R. I. & P. Ry. Co. v. Groves, 93 P. 755, 20 Okl. 101, 22 L. R. A. (N. S.) 802.

brought with them the rules of the common law as recognized by the American courts.[34]

Words not defined by statute, but having a fixed meaning at common law, will be given the common-law meaning.[35]

§ 9. Obiter dictum

The expression of a view on a point not necessary to the decision is "obiter dictum," [36] binding upon nobody.[37]

§ 10. Law of the case

The trial court's error in setting aside a verdict and in granting a new trial where it has jurisdiction to do so, unless appealed from or otherwise legally reviewed, becomes final, and cannot be availed of by the litigant prejudicially affected in a subsequent trial of same cause.[38]

Where plaintiff's demurrer to paragraphs of the answer has been overruled his motion to strike the same paragraphs for the same reasons assigned in the demurrer is properly denied.[39]

Where the Supreme Court renders a decision which is afterwards overruled, the overruled decision is the law of the case in which rendered.[40] A person not a party or privy in an action cannot have a vested right in an erroneous decision made therein.[41]

§ 11. Statutes and construction

Provision has been recently made for a compilation of all laws of a general nature, without change or modification, except the elimination of all statutes which have been expressly repealed. Each section shall be numbered consecutively with the corresponding number of the Revised Laws of Oklahoma of 1910.[42]

[34] Hoppe Hardware Co. v. Bain, Sheriff, et al., 21 Okl. 177, 95 P. 765, 17 L. R. A. (N. S.) 310, following McKennon v. Winn, 1 Okl. 327, 33 P. 582, 22 L. R. A. 501.

[35] Welty v. U. S., 14 Okl. 7, 76 P. 121.

[36] Lansten v. Lansten, 55 Okl. 518, 154 P. 1182.

[37] State v. Crosby Bros. Mercantile Co., 103 Kan. 896, 176 P. 670.

[38] O'Neil Engineering Co. v. City of Lehigh, 75 Okl. 227, 182 P. 659.

[39] Deering v. Meyers, 116 P. 793, 29 Okl. 232.

[40] Stonebraker v. Ault, 59 Okl. 189, 158 P. 570.

[41] Crigler v. Shepler, 101 P. 619, 79 Kan. 834, 23 L. R. A. (N. S.) 500.

[42] Sess. Laws 1921, p. 158 (H. B. 490), §§ 1–4.

In the construction of statutes, the intention of lawmakers, when ascertained, must govern.[43]

The presumption is that the Legislature does not intend to change existing law beyond what is expressly declared; and, where an act creating a remedy or right does not prescribe the procedure, it will be assumed that the general procedure was intended, unless expressly excluded.[44]

In construing a statute containing words which have a fixed meaning at common law, which the statute nowhere defines, they will be given the same meaning they have at common law.[45] The court may look to the evils and mischiefs to be remedied.[46]

Where there is a doubt as to the legislative intent arising from the wording of the statute, the court should follow that construction which will lead to the most reasonable conclusion if violence is not done to the plain meaning of the words of the statute.[47]

Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship, or ambiguity, and to favor public convenience.[48]

When a strict construction of a particular statute would defeat legislative intent, as shown by other enactments on the same sub-

[43] In re Cleveland's Claim (Okl.) 180 P. 852.

Any rule of statutory construction which defeats the legislative intent must be abandoned. Cherokee County Pub. Co. v. Cherokee County, 48 Okl. 722, 151 P. 187. Where the language of an act conveys a definite meaning involving no absurdity, or any contradiction of other parts of the statute, the apparent meaning must be accepted. Falter v. Walker, 47 Okl. 527, 149 P. 1111.

[44] State v. Hooker, 98 P. 964, 22 Okl. 712.

[45] Welty v. United States, 76 P. 121, 14 Okl. 7.

[46] Blevins v. W. A. Graham Co. (Okl.) 182 P. 247; Board of Com'rs of Creek County v. Alexander, 58 Okl. 128, 159 P. 311; Blevins v. W. A. Graham Co. (Okl.) 182 P. 247.

[47] St. Louis-San Francisco Ry. Co. v. Caldwell, 75 Okl. 153, 182 P. 688.

[48] McGannon v. State, 124 P. 1063, 33 Okl. 145, Ann. Cas. 1914B, 620.

A statute must be given the meaning apparent on its face where the words used convey a distinct meaning which involves no absurdity or contradiction. Leahy v. Indian Territory Illuminating Oil Co., 39 Okl. 312, 135 P. 416.

It is the duty of the courts to sustain elections when free from fraud or charge of improper conduct, where it can be done by a liberal construction of the laws relating thereto, rather than defeat them by requiring a rigid conformity to technical statutory directions not affecting the substantial rights of the electors. Town of Grove v. Haskell, 104 P. 56, 24 Okl. 707.

ject in pursuance of a general purpose in accomplishing a particular result, such construction should not be adopted.[49]

An apparent intent of an amendment will be carried into the original act, and every presumption indulged to effectuate that intent.[50] A statute which is inconsistent with, and covers the entire subject covered by, a prior statute, but which does not expressly repeal it, may be construed to repeal it by substitution.[51]

§ 12. —— Erroneous words and punctuation

Where the plain intent can be gathered from the context, the court may substitute or supply a necessary word.[52]

Courts are not bound by punctuation or grammatical construction, but will give effect, if possible, to the true meaning of the statute.[53] But less latitude is allowed in the construction of a criminal statute than in the case of a civil statute.[54]

§ 13. —— Rule of ejusdem generis

Under the rule of ejusdem generis, where general words follow the enumeration of particular classes, the general words will be

[49] In re Cleveland's Claim (Okl.) 180 P. 852; Groom v. Wright, 121 P. 215, 30 Okl. 652.

Statutes are not to be taken literally, but are to be interpreted so as to give effect to the purpose of the law-making power; and to the legislative intent is to be ascribed a reasonable and not a technical meaning. Brown v. Woods, 39 P. 473, 2 Okl. 601.

[50] Bonnett v. State, 47 Okl. 503, 150 P. 198.

[51] J. W. Ripey & Son v. Art Wall Paper Mill, 112 P. 1119, 27 Okl. 600.

[52] Trustees', Executors' & Securities Ins. Corp. v. Hooton, 53 Okl. 530, 157 P. 293, L. R. A. 1916E, 602.

The word "and" may be substituted for the word "or" when necessary to make a statute express the true legislative intent as gathered from the context and the circumstances attending its enactment. State v. Hooker, 98 P. 964, 22 Okl. 712.

Where words have been erroneously used in a statute and the context affords the means of correction, the proper words will be deemed substituted. Schaffer v. Board of Com'rs of Muskogee County, 124 P. 1069, 33 Okl. 288.

[53] Ex parte Hunnicutt, 123 P. 179, 7 Okl. Cr. 213.

The intention of the Legislature governs the construction of a statute, and, if that requires a change in the punctuation, or even in the wording, of the statute, such change must be made. Stiles v. City of Guthrie, 41 P. 383, 3 Okl. 26.

[54] The courts have no power to add to the plain and mandatory provision of the statute fixing the punishment for the crime of perjury (Rev. Laws 1910, § 2219, subd. 1), though the word "information" is clearly omitted therefrom through an oversight of the committee revising the Code and of the Legislature. Arnold v. State (Okl. Cr. App.) 132 P. 1123.

construed as applicable only to things of the same general character or class as those enumerated,[55] except where the particular words exhaust the class.[56] This rule is resorted to merely as an aid in the construction of a statute and has no application where it clearly appears that the Legislature intended the general words to go beyond the class specifically designated.[57]

Where the court finds an expression not so definite in its import as other parts of the statute, if upon review of the whole the real intention can be collected from the definite expressions, a construction should be adopted that will give effect to the definite expressions used unless it contravenes some other potent provision of law.[58]

§ 14. —— Statutes construed as a whole

A statute must be construed as a whole, and every word in it made effective if possible.[59] Where there is an apparent conflict in different portions of a statute, the court should harmonize them, if practicable, giving that construction which will render them operative.[60]

[55] Board of Com'rs of Kingfisher County v. Grimes, 75 Okl. 219, 182 P. 897.

[56] Where particular words of a statute exhaust the class, then general words must be given a meaning beyond the class. Kansas City Southern Ry. Co. v. Wallace, 38 Okl. 233, 132 P. 908, 46 L. R. A. (N. S.) 112.

[57] Kansas City Southern Ry. Co. v. Tansey, 139 P. 267, 41 Okl. 543; Kansas City Southern Ry. Co. v. Wallace, 38 Okl. 233, 132 P. 908, 46 L. R. A. (N. S.) 112.

[58] Ex parte Tyler, 102 P. 716, 2 Okl. Cr. 455.

[59] Territory v. Clark, 35 P. 882, 2 Okl. 82; Bohart v. Anderson, 103 P. 742, 24 Okl. 82, 20 Ann. Cas. 142; Bretz v. El Reno State Bank (Okl.) 177 P. 362; Matthews v. Rucker (Okl.) 170 P. 492; Board of Com'rs of Creek County v. Alexander, 58 Okl. 128, 159 P. 311; Kansas City Southern Ry. Co. v. Wallace, 38 Okl. 233, 132 P. 908, 46 L. R. A. (N. S.) 112; Blevins v. W. A. Graham Co. (Okl.) 182 P. 247; Ex parte Hunnicutt, 123 P. 179, 7 Okl. Cr. 213; Lee v. Roberts, 41 P. 595, 3 Okl. 106.

[60] Trapp v. Wells Fargo Express Co., 97 P. 1003, 22 Okl. 377.

While it is part of the history of the Statutes of 1893 that different portions of them were adopted without material alteration from the statutes of different states, and that different portions are not, in all respects, consistent with each other, it is yet the duty of the Supreme Court to endeavor to reconcile them wherever it is possible so to do, in order that the legislative intent may be, as far as possible, effective. One part of the statute will not be allowed to defeat another, if, by any reasonable construction, the two may be made to stand together. Durham v. Linderman, 64 P. 15, 10 Okl. 570.

There is no conflict between different provisions of a statute, if there is

§ 15. Statutes construed together or in the light of each other

To ascertain the legislative intent in the enactment of a statute, the court may look to other statutes upon the same or related subjects.[61]

Statutes are in pari materia which relate to the same person or thing or same class of persons or things. To ascertain the legislative intent in enacting a statute, not only must the whole statute and every part of it be considered, but, where there are several statutes in pari materia, they are all, whether referred to or not, to be taken together, and one part construed with another in the construction of any material provision.[62]

Acts passed at same legislative session, and particularly those

a reasonable meaning of the words used, considering the manner of their use, which will bring them into harmony. Sackett v. Rose, 55 Okl. 398, 154 P. 1177, L. R. A. 1916D, 820.

When statutes contain two distinct provisions, one being specific with precise directions to do a particular thing for a specific purpose, and the other general, prohibiting certain acts which in their general sense include the particular thing authorized by the specific direction, the general prohibition clause does not control the specific authority. The particular direction is construed in the nature of an exception. Atchison, T. & S. F. R. Co. v. Haynes, 58 P. 738, 8 Okl. 576.

[61] Blevins v. W. A. Graham Co. (Okl.) 182 P. 247.

Where different legislative enactments have reference to same subject and are consistent with each other, they should be construed together and harmonized, if possible, so that effect will be given each so far as is consistent with evident intent of latest enactment. Thacker v. Witt, 64 Okl. 169, 166 P. 713. Subsequent statutes may be considered as aid in interpreting prior legislation on same subject. Id.

Subsequent legislative enactments may be considered as aid in interpretation of prior legislation on same subject. Board of Com'rs of Creek County v. Alexander, 58 Okl. 128, 159 P. 311. When strict interpretation of particular statute would defeat intent as shown by other legislation enacted according to general purpose in accomplishing particular result, such construction should not be adopted. Id.

[62] De Graffenreid v. Iowa Land & Trust Co., 95 P. 624, 20 Okl. 687.

The laws regulating the issue and registration of warrants, and for issue and sale of bonds for the purpose of realizing a fund out of which to pay such warrants, are pari materia, and must be construed with reference to each other. Diggs v. Lobitz, 43 P. 1069, 4 Okl. 232.

When two statutes covering the same matter are not wholly irreconcilable, effect should be given to both. Carpenter v. Russell, 73 P. 930, 13 Okl. 277. Where two statutes cover the same matter, and one part of them is susceptible of two constructions, and language of another part is clear and is consistent with one of such constructions and opposed to the other, the construction harmonizing all sections must be adopted. Town of Comanche v. Ferguson (Okl.) 169 P. 1075.

passed at nearly the same time relating to similar subject, are presumed to be actuated by the same policy, and should be construed each in the light of the other.[63]

Statutory provisions, which have been repealed or superseded, may be looked to in construction of amendatory acts in pari materia.[64]

The state statutes are to be construed in connection with the Constitution of the United States and acts of Congress adopted in pursuance thereof.[65]

Where there are two statutory provisions, one of which is special and clearly includes the matter in controversy, and prescribes different rules and procedure from those in the general statute, the special statute, and not the general statute, applies.[66]

[63] State v. Prairie Oil & Gas Co., 64 Okl. 267, 167 P. 756.

The rule that statutes relating to the same subject-matter should be construed together, and effect given to each, ought specially to be applied where the statutes were enacted at the same session of the Legislature. Hess v. Trigg, 57 P. 159, 8 Okl. 286.

Acts passed the same day, separately, or at the same session, are to be construed together; the presumption being that they are all intended to operate, and may not be altered by construction, when the words may have their proper operation without it. Trapp v. Wells Fargo Express Co., 97 P. 1003, 22 Okl. 377.

Act May 1, 1913 (Laws 1913, c. 161), consolidating certain offices and providing for deputies, and Act May 19, 1913 (Laws 1913, c. 212), fixing the salary of county officers in counties having a population of over 80,000, being passed at the same session of the Legislature, should be construed together as one act, so that all parts of the act may stand. Ratliff v. Fleener, 143 P. 1051, 43 Okl. 652.

Sess. Laws 1913, c. 161, consolidating the offices of register of deeds and county clerk, should be construed, in determining its constitutionality, in pari materia with Sess. Laws 1913, c. 212, as amended by Act Feb. 1, 1915 (Laws 1915, c. 6), and as if it had read from the beginning as it does with the amendatory act incorporated in it. Bonnett v. State, 47 Okl. 503, 150 P. 198.

[64] Searcy v. State, 64 Okl. 257, 167 P. 476.

[65] Overton v. State, 123 P. 175, 7 Okl. Cr. 203, denying rehearing 114 P. 1132, 7 Okl. Cr. 203.

[66] Gardner v. School Dist. No. 87, Kay County, 126 P. 1018, 34 Okl. 716.

A general act is not to be construed as applying to cases covered by a prior special act on the same subject. Carpenter v. Russell, 73 P. 930, 13 Okl. 277.

The courts in construing a general statute should interpret it so as not to conflict with an earlier special statute which could stand independently for a useful purpose. Incorporated Town of Valliant v. Mills, 116 P. 190, 28 Okl. 811.

A joint resolution, signed by the Governor, but not having the force of law, declaring the purpose of a former act, may be considered as an aid in construing such former act.[67]

§ 16. —— Administrative construction

The construction placed on statutes or constitutional provisions by officers in the discharge of their duties, and which has been long acquiesced in, is to be considered in the interpretation of the same.[68]

§ 17. —— Provisos or exceptions

The proviso of a statute is generally a clause containing a condition that a certain thing shall or shall not be done in order that something in another clause shall take effect.[69] Its office being to restrain or qualify some preceding matter, it should be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter, and is to be construed in connection with the section of which it forms part.[70] It relates to the paragraph or distinct portion of the enactment which immediately precedes it, unless the contrary intention is clearly apparent.[71]

§ 18. —— Statute adopted from another state

Where a statute is taken from another state after its construction by the highest court of that state, it is presumed that it was adopted as so construed;[72] but, to sustain the presumption, such construc-

[67] Board of Com'rs of Creek County v. Alexander, 58 Okl. 128, 159 P. 311.

[68] League v. Town of Taloga, 129 P. 702, 35 Okl. 277.

The construction placed on statutes by officers charged with the enforcement thereof at or near the time of their enactment, and which has long been acquiesced in, is a just medium for their judicial interpretation. Hunter v. State, 49 Okl. 672, 154 P. 545; Foote v. Town of Watonga, 130 P. 597, 37 Okl. 43.

A ruling of the Commissioner of the General Land Office that the date of application for enrollment of a citizen of the Five Civilized Tribes should be held to be the anniversary of the birth is not a construction of Act Cong. May 27, 1908, § 3, relating to conclusiveness of enrollment as to age of Indian. Heffner v. Harmon, 60 Okl. 153, 159 P. 650.

[69] Trimmer v. State, 141 P. 784, 43 Okl. 152.

[70] Searcy v. State, 64 Okl. 257, 167 P. 476.

[71] Leader Printing Co. v. Nichols, 50 P. 1001, 6 Okl. 302.

[72] Conwill v. Eldridge (Okl.) 177 P. 79; Chisholm v. Weisse, 39 P. 467, 2 Okl. 611; St. Louis & S. F. R. Co. v. Bruner, 52 Okl. 349, 152 P. 1103.

Where a statute is adopted from another state, decisions of the Supreme Court of such state, construing the statute prior to its adoption, are controlling. Amsden v. Johnson (Okl.) 158 P. 1148.

It will be presumed that Congress, in adopting statutes of Arkansas for

tion must have been placed thereon by the highest judicial tribunal authorized to pass upon the question, and must have been so long established as to have been known, or so long that it reasonably might have been known, to the legislature adopting it.[73] It follows that the decisions of the Supreme Court of Kansas, construing the Code provisions of that state before their adoption in Oklahoma, are ordinarily binding here.[74] This means that these decisions are as conclusive on the Oklahoma Supreme Court as one of their own former decisions would be, not that they cannot decide contrary to it under the same circumstances that would justify the revocation of one of their own prior decisions.[75] The Nebraska Code originally was practically identical with the Kansas Code, and is now very similar to both the Kansas and Oklahoma Codes. While the Nebraska decisions are not binding in Oklahoma, yet so

the Indian Territory, adopted the construction previously placed on them by the Supreme Court of Arkansas. Steele v. Kelley, 122 P. 934, 32 Okl. 547; National Live Stock Commission Co. v. Taliaferro, 93 P. 983, 20 Okl. 177; State v. Caruthers, 98 P. 474, 1 Okl. Cr. 428; Glenn v. City of Ardmore, 122 P. 658, 32 Okl. 414.

The Supreme Court will follow the principles of construction and interpretation of the Code of Civil Procedure which are applied by the Supreme Court of Kansas, since it was adopted from that state. United States v. Choctaw, O. & G. R. Co., 41 P. 729, 3 Okl. 404.

The Code of Civil Procedure (St. 1890) having been adopted from Indiana, and the Supreme Court of that state having, prior to such adoption, held that the provision of the Code relating to the trial of rights of property was applicable only to proceedings before a justice of the peace, the Supreme Court of Oklahoma is bound by that construction. Hixon v. Hubbell, 44 P 222, 4 Okl. 224.

Laws 1907–08, c. 10, art. 1, is not affected by construction placed on a similar law by the Supreme Court of Missouri, in the absence of a showing that such act was borrowed from Missouri after the law of that state had been construed. Wheeler v. City of Muskogee, 51 Okl. 48, 151 P. 635.

[73] Smith v. Baker, 49 P. 61, 5 Okl. 326.

The mining act of Pennsylvania though similar to the Kansas statute (Gen. St. 1909, §§ 4975–5059) enacted to protect the health and safety of mine workers, was not adopted as the law of Kansas, and hence the Pennsylvania Supreme Court decisions interpreting it are persuasive only. Burgin v. Missouri, K. & T. Ry. Co., 133 P. 560, 90 Kan. 194.

[74] Mulhall v. Mulhall, 3 Okl. 308, 41 P. 109; Grimes v. Cullison, 3 Okl. 270, 41 P. 355; Oklahoma City v. Welsh, 3 Okl. 295, 41 P. 598; Kilgore v. Yarnell et al., 24 Okl. 525, 103 P. 698. Following Farmers' State Bank of Arkansas City v. Stephenson, 23 Okl. 695, 102 P. 992; Brown et al. v. Massey, 19 Okl. 482, 92 P. 246; Brunson v. Merrill, 17 Okl. 44, 86 P. 431.

[75] Greenville Nat. Bank v. Evans-Snyder-Buel Co., 9 Okl. 353, 60 P. 249.

far as they are consistent with logic and reason they will be followed.[76]

The Oklahoma Supreme Court is not bound by a subsequent construction or by a decision of an intermediate court of appeals of the other state.[77]

The rule that the Legislature in adopting a statute of another state is presumed to have adopted the construction placed thereon by the highest court of such state does not apply where such construction is contrary to the Constitution or well-defined legislative policy of the adopting state, or the adopted statute exists in many states and the decided weight of authority is against such construction.[78]

Where a statute is not peculiar to the state from which it was adopted, but other states have substantially the same statute which their courts have construed differently, the construction of the state from which it was adopted, being opposed to the weight of authority, will not be followed.[79]

§ 19. Adjournment by sheriff

"If the judge of a court fail to attend at the time and place appointed for holding his court, the sheriff shall have power to adjourn the court, from day to day, until the regular or assigned judge at-

[76] Allsman v. Oklahoma City, 21 Okl. 142, 95 P. 468, 17 Ann. Cas. 184, 16 L. R. A. (N. S.) 511, note; Swan v. Wilderson, 10 Okl. 547, 62 P. 422.

[77] Given v. Owen (Okl.) 175 P. 345.

A decision of the Supreme Court of Arkansas, rendered since the laws of that state were extended over the Indian Territory, is not even persuasive when in conflict with the settled law of Oklahoma. Marx v. Hefner, 46 Okl. 453, 149 P. 207, Ann. Cas. 1917B, 656. Kansas decisions, construing a statute subsequent to its adoption in Oklahoma, have no binding force here. Richardson et al. v. Penny, 9 Okl. 655, 60 P. 501.

The construction placed upon a statute of a state by the court of last resort of that state at the time of its adoption by another state is controlling in construing the statute in the latter state, and not subsequent constructions. Barnes v. Lynch, 59 P. 995, 9 Okl. 11, 156.

[78] Hutchinson v. Krueger, 124 P. 591, 34 Okl. 23, 41 L. R. A. (N. S.) 315, Ann. Cas. 1914C, 98.

A statute adopted from another state does not bring with it the construction placed upon it by the highest court of that state, where such construction is contrary to the Constitution or well-defined policy of the adopting state or is contrary to the decided weight of authority of other states. Western Terra Cotta Co. v. Board of Education of City of Shawnee, 136 P. 595, 39

[79] Ex parte Bowes, 127 P. 20, 8 Okl. Cr. 201.

tend, or a judge pro tempore be selected; but if the judge be not present in his court, nor a judge be assigned or a judge pro tempore be selected, within two days after the first day of the term, then the court shall stand adjourned for the term. The sheriff shall exercise the powers and duties conferred and imposed upon him by the statutes of this State, and by the common law." [80]

§ 20. Publications

"All publications and notices required by law to be published in newspapers in this state, if published in newspapers having one side of the paper printed away from the office of publication, known as patent outsides or insides, shall have the same force and effect as though the same were published in newspapers printed wholly and published in the county where such publication shall be made, if one side of the paper is printed in said county where said notices are required to be published." [81]

§ 21. Affirmation

"Whenever an oath is required by this Code, the affirmation of a person, conscientiously scrupulous of taking an oath, shall have the same effect." [82]

§ 22. Computation of time

"The time within which an act is to be done shall be computed by excluding the first day, and including the last; if the last day be Sunday, it shall be excluded." [83]

§ 23. Surety—Justification

"A ministerial officer, whose duty it is to take security in any undertaking provided for by this Code or by other statutes, shall require the person offered as surety to make an affidavit of his qualifications, which affidavit may be made before such officer, and shall be indorsed upon or attached to the undertaking. The taking of such an affidavit shall not exempt the officer from any liability to which he might otherwise be subject for taking insufficient security." [84]

Okl. 716. The mechanics' lien law, though adopted from Kansas, will not be given the construction placed upon it by the Supreme Court of Kansas so as to permit liens on public property. Id.

[80] Rev. Laws 1910, § 5338.
[81] Rev. Laws 1910, § 5348.
[82] Rev. Laws 1910, § 5340.
[83] Rev. Laws 1910, § 5341.
[84] Rev. Laws 1910, § 5342.

§ 24. —— Qualifications

"The surety in every undertaking provided for by this Code or other statutes, unless a surety company, must be a resident of this state and worth double the sum to be secured, over and above all exemptions, debts and liabilities. Where there are two or more sureties in the same undertaking, they must, in the aggregate, have the qualifications prescribed in this section." [85]

§ 25. —— Real estate mortgage as bond

"In every instance in this state where bond, indemnity or guaranty is required, a first mortgage upon improved real estate within this state shall be accepted: Provided, that the amount of such bond, guaranty or indemnity shall not exceed fifty per cent. of the reasonable valuation of such improved real estate, exclusive of all buildings thereon; provided, further, that where the amount of such bond, guaranty or indemnity shall exceed fifty per cent. of the reasonable valuation of such improved real estate, exclusive of all buildings, then such first mortgage shall be accepted to the extent of such fifty per cent. valuation." [86]

§ 26. —— Valuation of real estate

"The officer, whose duty it is to accept and approve such bond, guaranty or indemnity, shall require the affidavits of two freeholders versed in land values in the community where such real estate is located to the value of such real estate. Said officer shall have the authority to administer the oaths and take said affidavits." [87]

§ 27. —— False valuation—Penalty

"Any person willfully making a false affidavit as to the value of any such real estate shall be guilty of perjury and punished accordingly. Any officer administering or accepting such affidavit knowing it to be false, shall be guilty of subornation of perjury and punished accordingly." [88]

§ 28. Action on bond

"When an officer, executor or administrator within this state, by misconduct or neglect of duty, forfeits his bond or renders his sureties liable, any person injured thereby, or who is, by law, entitled to

[85] Rev. Laws 1910, § 5343.
[86] Rev. Laws 1910, § 5344.
[87] Rev. Laws 1910, § 5345.
[88] Rev. Laws 1910, § 5346.

the benefit of the security, may bring an action thereon in his own name, against the officer, executor or administrator and his sureties, to recover the amount to which he may be entitled by reason of the delinquency. The action may be instituted and proceeded in on a certified copy of the bond, which copy shall be furnished by the person holding the original thereof." [89]

§ 29. Several actions on security

"A judgment in favor of a party for one delinquency does not preclude the same or another party from an action on the same security for another delinquency." [90]

§ 30. Submission of controversy

"Parties to a question, which might be the subject of a civil action, may without action agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court, which would have jurisdiction if an action had been brought. But it must appear, by affidavit, that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The court shall thereupon hear and determine the case, and render judgment as if an action were pending." [91]

"The case, the submission, and a copy of the judgment, shall constitute the record." [92]

"The judgment shall be with costs, may be enforced, and shall be subject to reversal in the same manner as if it had been rendered in an action, unless otherwise provided in the submission." [93]

§ 31. Impeachment and removal from office

Any elective state officer may be impeached for cause.[94] All elective officers not liable to impeachment shall be subject to removal from office.[95]

"When sitting as a court of impeachment, the Senate shall be presided over by the Chief Justice, or if he is absent or disqualified, then one of the Associate Justices of the Supreme Court, to be selected by it, except in cases where all the members of said court are absent or disqualified, or in cases of impeachment of any Jus-

[89] Rev. Laws 1910, § 5349.
[90] Rev. Laws 1910, § 5350.
[91] Rev. Laws 1910, § 5303.
[92] Rev. Laws 1910, § 5304.
[93] Rev. Laws 1910, § 5305.
[94] Const. Okl. art. 8, § 1.
[95] Const. Okl. art. 8, § 2.

tice of the Supreme Court, then the Senate shall elect one of its own members as a presiding officer for such purposes. The House of Representatives shall present all impeachments." [96]

"When the Senate is sitting as a court of impeachment, the Senators shall be on oath, or affirmation, impartially to try the party impeached, and no person shall be convicted without the concurrence of two-thirds of the Senators present." [97]

"Judgment of impeachment shall not extend beyond removal from office, but this shall not prevent punishment of any such officer on charges growing out of the same matter by the courts of the state." [98]

"The Legislature shall pass such laws as are necessary for carrying into effect the provisions of this article." [99]

Division II.—Judges in General.

§ 32. As public officer

The judges of the district courts [1] and of the superior courts are state officers.[2]

An attorney at law, when elevated to the bench of any court of record, is prohibited from practicing law in any state court, so long as he occupies such position.[3] He is only permitted to finish business on hand in the United States courts at the time of his elevation to the bench.[4]

§ 33. Judge pro tempore

Where a county judge certifies his disqualification in a particular case or proceeding, a judge pro tempore must be elected.[5] The record must show that the judge of the trial court was disqualified, that such special judge was an attorney duly agreed on or elected, and that he took the required oath.[6] The pro tempore county judge

[96] Const. Okl. art. 8, § 3.
[97] Const. Okl. art. 8, § 4.
[98] Const. Okl. art. 8, § 5.
[99] Const. Okl. art. 8, § 6.
[1] Grayson v. Perryman, 25 Okl. 339, 106 P. 954.
[2] State v. Breckinridge, 34 Okl. 649, 126 Pac. 806.
[3] Lilly v. State, 123 P. 575, 7 Okl. Cr. 284, Ann. Cas. 1914B, 443.
[4] Id.
[5] State v. Taylor (Okl.) 171 P. 452; Rev. Laws 1910, § 5814.
[6] Apple v. Ellis, 50 Okl. 80, 150 P. 1057.

in a given case is, for the time being and for the purpose of that case, a "county officer." [7]

A disqualified judge should carefully abstain from taking any part in the selection of the person who is to preside in his place in the trial of a cause in which he has been disqualified.[8] His authority ceases with a lapsing of the term at which he was selected, unless the case is finally disposed of at such term, and in that case ceases with a final disposition of the cause.[9]

Prior to 1909 no provision having been made by law whereby a judge pro tempore could be selected in the event of the disqualification of the regular judge, a special judge elected by the members of the bar present, which election was opposed by one of the parties to the action was not a judge either de jure or de facto, and a trial had before him was a nullity.[10]

All orders, judgments, and decrees made by a judge pro tempore not lawfully selected are a nullity.[11]

§ 34. Waiver of objections

Where a special judge is chosen to sit in a particular case, which is not finally determined at the term, and he presides at a subsequent term at which his authority is recognized by the parties, they thereby waive any objection that he was not re-elected.[12] And where counsel for defendants fail to challenge the votes of attorneys for plaintiff on the election of a judge pro tempore, they cannot make such objection after the election of one opposed by them.[13]

§ 35. Powers of special judges

A special judge, selected by agreement, has no jurisdiction over any cause other than the one in which he is selected.[14]

[7] Board of Com'rs of Oklahoma County v. Twyford, 39 Okl. 230, 134 P. 968.

[8] Kelly v. Ferguson, 114 P. 631, 5 Okl. Cr. 316; Id., 115 P. 284, 5 Okl. Cr. 700.

[9] Dodd v. State, 115 P. 632, 5 Okl. Cr. 513. An order for a change of venue by a judge pro tempore not lawfully selected, though on petition of accused, confers no authority on a duly qualified judge in the county to which the change is ordered. Id.

[10] Stanclift v. Swingle, 120 P. 252, 30 Okl. 544; Cowart v. State, 111 P. 672, 4 Okl. Cr. 122; Williams v. State, 113 P. 1060, 5 Okl. Cr. 144.

[11] Dodd v. State, 115 P. 632, 5 Okl. Cr. 513.

[12] Ellington v. State, 123 P. 186, 7 Okl. Cr. 252.

[13] Deninger v. Gossom, 46 Okl. 596, 149 P. 220.

[14] Hirsh v. Twyford, 139 P. 313, 40 Okl. 220.

Where an application for change of judge is granted, and the clerk of the district court is ordered to notify the clerk of the Supreme Court of such change, and on the same day an order at chambers is made by the chief justice assigning another judge to hold the district court and determine all cases that may come before him during the absence of the regular judge, the judge so assigned has jurisdiction to try any case or matter which may come before him while acting under such order.[15]

Where a district judge is assigned by the Chief Justice of the Supreme Court to hold court in another district than his own, such judge while so acting is a judge pro tempore of the district in which he is sitting.[16] That the regular judge is holding court in the same district and at the same time that a special judge is trying a criminal case therein does not affect the latter's jurisdiction.[17]

Where the regularly elected judge is disqualified and a special judge is selected, his authority ceases at the end of the term; and if the case is continued to another term the special judge has no authority to preside at the trial of the second term, unless again lawfully selected.[18]

A district judge has no right or power to perform judicial acts affecting cases pending in any other district, unless authorized to do so by constitutional or statutory provision.[19]

A special county judge, appointed to try the issues in a proceeding to probate a will, is without jurisdiction to appoint an administrator of the estate or to make any other order as to the administration proceeding.[20]

§ 36. Liabilities

An action will not lie against a judicial officer for a judicial act, where there is jurisdiction of the person and subject-matter, though it was done maliciously, or even corruptly. The same protection

[15] Barbe v. Territory, 86 P. 61, 16 Okl. 562; Id., 91 P. 783, 19 Okl. 119.

[16] Dobbs v. State, 115 P. 370, 5 Okl. Cr. 475, denying rehearing 114 P. 358, 5 Okl. Cr. 475.

[17] Johnson v. State, 97 P. 1059, 1 Okl. Cr. 321, 18 Ann. Cas. 300.

[18] Patterson v. United States, 7 Okl. Cr. 272, 118 P. 150.

[19] Dobbs v. State, 115 P. 370, 5 Okl. Cr. 475, denying rehearing 114 P. 358, 5 Okl. Cr. 475.

[20] State v. Outcelt, 143 P. 198, 43 Okl. 482.

extends to judges of inferior and limited, as well as to those of general, jurisdiction as to liability for official acts.[21]

§ 37. Change of judge

Under the constitutional provision that right and justice shall be administered without prejudice, a change of judge for bias or prejudice is a constitutional right.[22]

§ 38. —— Disqualifications

When prejudice of the trial judge is made ground for a motion for change of judge, the Legislature may prescribe the method of determining such matter, but it cannot abolish such ground of disqualification.[23]

The interest of the district judge as a resident taxpayer of the petitioning municipality in condemnation proceedings will not dis-

[21] Waugh v. Dibbens, 61 Okl. 221, 160 P. 589, L. R. A. 1917B, 360. A county judge, in rendering judgment in a case pending in his court, acts judicially, and is not amenable to a civil action for damages, though the judgment was erroneous, and, in rendering it, he erroneously exceeds the jurisdiction of his court. Comstock v. Eagleton, 69 P. 955, 11 Okl. 487, appeal dismissed (1905) 25 S. Ct. 210, 196 U. S. 99, 49 L. Ed. 402.

Where an administrator, pursuant to order of county court, paid into court an amount in excess of inheritance tax, and the county judge failed to turn over money after expiration of term, the money did not come into his hands as county judge so as to render his bond liable. Pitman v. State, 59 Okl. 270, 158 P. 1137.

[22] Rea v. State, 105 P. 384, 3 Okl. Cr. 276, 139 Am. St. Rep. 954.

Sess. Laws 1908, p. 285, c. 27, art. 1, § 8, provides that no judge of the county court shall sit in any proceeding after a party has filed an affidavit in writing, corroborated by two credible persons, that affiant has reason to believe and does believe that the judge is prejudiced, where he cannot have a fair and impartial trial before him. Held, that this provision does not abridge the declaration in Bill of Rights that right and justice shall be administered without sale, denial, delay, or prejudice. Ex parte Ellis, 105 P. 184, 3 Okl. Cr. 220, 25 L. R. A. (N. S.) 653, Ann. Cas. 1912A, 863. Under Bill of Rights, art. 2, § 6, providing that right and justice shall be administered without sale, denial, delay, or prejudice as well as by the unwritten dictates of natural justice, the courts are commanded to administer justice without prejudice. Id.

[23] Mayes v. Pitchford, 109 P. 821, 26 Okl. 129; Ex parte Hudson, 106 P. 540, 3 Okl. Cr. 393, rehearing denied 107 P. 735, 3 Okl. Cr. 393; Ex parte Hines, 106 P. 544, 3 Okl. Cr. 408, rehearing denied 107 P. 738, 3 Okl. Cr. 408.

Const. Bill of Rights, art. 2, § 6, prohibits a judge from trying a case in which he is prejudiced by or for either party. McCullough v. Davis, 11 Okl. Cr. 431, 147 P. 779.

A judge may be disqualified for prejudice in favor of accused, though such disqualification is not provided for by statute, since it rests on constitutional grounds. State v. Brown, 126 P. 245, 8 Okl. Cr. 40, Ann. Cas. 1914C, 394.

qualify him;[24] but it has been held otherwise where the action constituted an attack on the validity of a special bond election to secure money to build a courthouse and jail.[25] That a county judge was disqualified by prejudice in the matter of the probate of a will did not disqualify him to determine other questions in the administration of the estate.[26]

§ 39. —— Relationship

The word "party," as used in the statute disqualifying a judge to sit in a case, wherein one party is related to him within the fourth degree of consanguinity, includes any person directly interested in the subject-matter of the suit or the result of the same, though not a party of record.[27] A judge is disqualified to sit in a case in which he is a material witness[28] or in which he participated as an attorney before his elevation to the bench.[29] This rule seems to have been qualified in one criminal case,[30] but cannot be relaxed in civil cases, particularly where there are contesting litigants. It has been held that a county judge was not disqualified from settling a guardian's account because he acted as attorney for the guardian in the matter of his appointment.[31]

[24] Lawton Rapid Transit Ry. Co. v. City of Lawton, 122 P. 212, 31 Okl. 458.

[25] Mackey v. Crump, 49 Okl. 578, 153 P. 1128; Rev. Laws 1910, § 5812.

[26] State v. Johnson, 139 P. 699, 40 Okl. 511.

[27] State v. Pitchford, 141 P. 433, 43 Okl. 105.

Under Rev. Laws 1910, § 5812, a judge is disqualified to hear a cause wherein his son is employed on a contingent fee as attorney for one party and, under section 248, giving him a lien, has an interest in the result. State v. Pitchford, 141 P. 433, 43 Okl. 105.

In a proceeding in the county court by a guardian to invest the money of his ward pursuant to Comp. Laws 1909, § 5513, the guardian was a "party" thereto within Comp. Laws 1909, § 5139, disqualifying a judge to act in any proceeding in which he may be related to any party within the fourth degree; and a brother-in-law of the guardian was disqualified to sit as judge in the proceeding. Hengst v. Burnett, 40 Okl. 42, 135 P. 1062.

[28] Powers v. Cook, 48 Okl. 43, 149 P. 1121, L. R. A. 1915F, 766.

[29] Dodd v. State, 115 P. 632, 5 Okl. Cr. 513.

[30] The mere fact that a judge may be witness in case, or that he has conducted a preliminary examination resulting in a prosecution of defendant, in the absence of any showing of bias or prejudice on his part, does not disqualify him. State v. Lockridge, 118 P. 152, 6 Okl. Cr. 216, 45 L. R. A. (N. S.) 525, Ann. Cas. 1913C, 251.

[31] Title Guaranty & Surety Co. v. Slinker, 128 P. 696, 35 Okl. 128; Id., 128 P. 698, 35 Okl. 153.

§ 40. —— Bias and prejudice

Public confidence in the judicial system demands that the cause be tried by an unprejudiced judge, and a denial of a change of judge on the ground of prejudice will be presumed a denial of justice, at least where the prejudice is clearly made to appear.[32]

A constitutional provision guaranteeing every person charged with crime a trial without prejudice does not include the opinion of the judge as to the guilt or innocence of the defendant; but to disqualify the judge, it must appear that he is biased against him to such an extent as will prevent his giving a fair trial.[33]

Judicial officers should abstain from participating in public meetings in which questions are discussed, which might afterward come before them for decision. A judge should not commit himself on questions of fact or law which may come before him, until the matter is properly presented in open court. There is a manifest difference between being prejudiced against the commission of a crime and being prejudiced against a person charged with its commission, and the fact that a judge is prejudiced against the crime does not disqualify him from presiding at a criminal trial.[34]

[32] Ex parte Ellis, 105 P. 184, 3 Okl. Cr. 220, 25 L. R. A. (N. S.) 653, Ann. Cas. 1912A, 863. Accused has a right to a change of judge where the presiding judge is prejudiced against him. Lewis v. Russell, 111 P. 818, 4 Okl. Cr. 129.

Under the law prior to the passage of Act March 22, 1909 (Laws 1909, c. 14; Snyder's Comp. Laws 1909, §§ 2012–2017), it was error to refuse a change of judge, where defendant filed an affidavit stating that the presiding judge was prejudiced against him, and for that reason he could not obtain a fair trial before such judge. Cavenees v. State, 109 P. 125, 3 Okl. Cr. 729.

Where a judge had not consulted with the county attorney as to the facts in a perjury case, and knew nothing concerning the facts thereof further than that the case was pending in his court, the fact that the judge stated upon hearing of a demurrer to the information that he thought the county attorney was correct in desiring the trial before the trial of another person for murder for whom the one accused of perjury was stated to be an important witness, so that, if the latter was innocent of perjury alleged to have been committed in a previous trial of the one charged with murder, such person might have the benefit of his evidence, and that, if the one charged with perjury was guilty, the state might have the benefit of the exclusion of his testimony, did not show prejudice of the judge towards the one charged with perjury so as to disqualify him from presiding at the trial. O'Brien v. Clark, 113 P. 543, 5 Okl. Cr. 112.

[33] Ingles v. McMillan, 113 P. 998, 5 Okl. Cr. 130, 45 L. R. A. (N. S.) 511.

[34] Crawford v. Ferguson, 115 P. 278, 5 Okl. Cr. 377, 45 L. R. A. (N. S.) 519;

§ 41. —— Objections and procedure

Where accused in good faith desires a change of judge on account of prejudice, he should exercise due diligence as soon as he can conveniently assert his rights after knowledge of such prejudice.[35] An application for change of judge for bias, stating no facts and filed after the jury is impaneled, is properly denied.[36] A defendant, seeking to disqualify a trial judge on any ground, must follow the statutory procedure.[37] The application or affidavit for change of judge for prejudice must set forth the facts on which the claim is based.[38]

Where speeches made by the judge in his campaign for re-election showed that he was prejudiced against defendant, an application for change of judge should have been granted.[39]

Where a district judge is disqualified to hear and determine a cause pending before him, and refuses to certify his disqualification when requested in the manner provided by law, mandamus will lie.[40]

§ 42. —— Form—Application for disqualification of judge

APPLICATION FOR DISQUALIFICATION OF JUDGE

Comes now the above-named defendant, J. D., and, after having given reasonable notice to the plaintiff herein, makes this his application for a certification of disqualification of the Honorable ———, judge of this court, in the above-entitled cause, and in support hereof this defendant states:

That this is an action instituted by the plaintiffs for the purpose

State v. Lockridge, 118 P. 152, 6 Okl. Cr. 216, 45 L. R. A. (N. S.) 525, Ann. Cas. 1913C, 251.

[35] Ingles v. McMillan, 113 P. 998, 5 Okl. Cr. 130, 45 L. R. A. (N. S.) 511.

[36] White v. State, 50 Okl. 97, 104, 150 P. 716, 718.

[37] Ex parte Hudson, 106 P. 540, 3 Okl. Cr. 393, rehearing denied 107 P. 735, 3 Okl. Cr. 393; Ex parte Hines, 106 P. 544, 3 Okl. Cr. 408, rehearing denied, 107 P. 738, 3 Okl. Cr. 408.

[38] Lewis v. Russell, 4 Okl. Cr. 129, 111 P. 818; Myers v. Bailey, 109 P. 820, 26 Okl. 133; Mayes v. Pitchford, 109 P. 821, 26 Okl. 129; Kelly v. Ferguson, 114 P. 631, 5 Okl. Cr. 316; Id., 115 P. 284, 5 Okl. Cr. 700.

Where it is sought to disqualify a judge because a material witness for defendant, the application for change of judge must clearly show wherein the testimony of the judge is material. Johnson v. Wells, 115 P. 375, 5 Okl. Cr. 599.

[39] McCullough v. Davis, 11 Okl. Cr. 431, 147 P. 779.

[40] State v. Fullerton, 76 Okl. 35, 183 P. 979.

of quieting their title to certain property described as follows, to wit: [Describe land.] That said action is a suit in equity, and said plaintiffs seek herein to have canceled, set aside, vacated, and held for naught a certain option contract made, executed, and delivered by the plaintiffs on or about ———, 19—, a copy of which said option contract is attached to the plaintiffs' petition herein, marked Exhibit A, and to which reference is hereby made, and to have canceled, set aside, and held for naught a certain warranty deed and a certain contract, both dated ———, 19—, executed by the plaintiffs to this defendant, J. D., a copy of which said deed and contract are attached to the plaintiffs' petition, marked Exhibits B and C, and to which reference is hereby made.

That a prior action was heretofore instituted in this court by the plaintiffs herein against one F. S. to have canceled and set aside certain instruments of conveyance made, executed, and delivered by the said plaintiffs to the said F. S., which said action is No. ——— in the district court of ——— county, Oklahoma, and which said action was heretofore, on or about the ——— day of ———, 19—, tried in this court before his honor, ———, judge of the said district court of ——— county, Oklahoma.

That in said action last above referred to it was the contention of the said defendant therein, F. S., that at least a part of the consideration for the deed executed to him by the plaintiffs, and which the plaintiff sought to have canceled, was certain financial and other assistance rendered by the said defendant, F. S., in connection with the conveyances to this defendant, J. D., and that upon the trial of said cause No. ——— in the district court of ——— county, Oklahoma, before his honor, ———, judge of said court, testimony was introduced and heard as to the transactions resulting in the option contract of ———, 19—, executed by the plaintiffs to this defendant, J. D., and with reference to the contract and deed of ———, 19—, executed by said plaintiffs to this defendant, J. D.

That this defendant, J. D., was not a party to said cause No. ——— in the district court of ——— county, Oklahoma, and was not represented or heard therein.

That in the present action the plaintiffs seek to have the instruments above mentioned, which were executed by the plaintiffs to this defendant, canceled upon the ground, among others, that said

instruments are invalid on account of want of consideration, and by pleadings filed in this cause an issue of fact has been joined upon the question of want of consideration for the execution of said instruments, as well as upon other questions referring to the validity of said instruments above mentioned executed by the plaintiffs to said defendant, J. D.

That this cause is assigned for trial before his honor, ———, on the ——— day of ———, 19—, who is one of the judges of said district court of ——— county, Oklahoma. That in said cause No. ——— in the district court of ——— county, Oklahoma, which was heard by his honor, the said ———, on or about the ——— day of ———, 19—, his honor, the said ———, made findings of fact upon the questions involved in said cause, and among other facts found with reference to the instruments above mentioned, executed by the plaintiffs to this defendant, and in connection with the procurement of which the said defendant in said cause No. ——— contended that he had rendered certain financial and other assistance as follows:

"I might add another word: Even if F. C. has paid $666.67, and that is all the testimony in the case shows he did pay for the sixth interest in this royalty, which to this day has produced something like $15,000, still the $666.67 absolutely gained no advantage for A. M. at all, because he paid it for an agreement which was supported by *absolutely not one penny's consideration, unless there is a dollar in the agreement.*" (Italics ours.)

That the payment above referred to, and which his honor, the said ———, found was no advantage whatever to the plaintiff herein, A. M., was a payment which the said defendant in said cause No. ——— testified he had made in connection with the execution and delivery of the instruments which the plaintiff in this case made, executed, and delivered to the defendant, J. D., and which the said plaintiffs are seeking in this cause to have canceled. That by said findings above referred to his honor, the said ———, found there was no consideration for the execution of the instruments executed by the plaintiffs to this defendant, J. D., and which said plaintiffs are seeking to cancel in this action.

That in his finding of facts in connection with said cause No. ——— his honor, the said ———, further found as follows:

"I am not certain that there is any more than a dollar, because

J. D. took an agreement to collect A. M.'s royalty or one-fourth thereof and pay him back with his own royalty, with an obligation not to pay any one single penny unless he did collect the royalties; in other words, J. D. was not out a single dollar, except for the option, which he might have exercised or not as he saw fit, but he actually made A. M. pay $333.34 back to get that option off; and after he did that he gave him one-half of the royalty. Of course, I am not holding that that contract is void, because that contract is not involved in this case. However, A. M. had still an option for $100 on his hands."

That, as heretofore stated, this is an equitable action, and his honor, the said ———, will pass upon both the questions of law and fact involved herein.

That by reason of the matters and things above set forth this defendant states that his honor, the said ———, is biased and prejudiced herein, and has formed and expressed his opinion upon certain questions of fact which are involved in this action, and upon which he, as the judge before whom this cause has been assigned for trial, must pass upon in the trial of this cause, and that by reason thereof he has prejudged this cause, and is disqualified from hearing the same, and should so certify his disqualification.

This defendant states that the matters and things hereinabove referred to all appear of record in this cause and in cause No. ——— in this court, and that the records and pleadings in said cause No. ——— and in this cause are referred to and made a part hereof in so far as necessary to show the matters and things hereinbefore set out.

Wherefore this defendant prays that this application for disqualification of his honor, the said ———, be allowed and granted, and that his honor, the said ———, certify herein his disqualification to hear this cause, and that such other and further proceedings be had and taken herein as are consistent with right and justice and the statutes in such cases made and provided.

J. D., Applicant,

By ———, His Attorneys.

State of Oklahoma,
County of ———} ss.:

J. D., of lawful age, being first duly sworn, upon oath deposes and says:

That he is the defendant named in the above and foregoing application for disqualification of judge; that he has read said application and knows the contents thereof, and that the matters and things therein set forth are true and correct.

[Signed] J. D.

Subscribed and sworn to before me this ——— day of ———, 19—.

[Seal.] [Signed] ———, Notary Public.

My commission expires ———.

NOTICE OF APPLICATION FOR DISQUALIFICATION OF JUDGE

To the Above-Named Plaintiffs, A. M. and B. M.:

You will please take notice that the above-named defendant, J. D., will on this day file with the court clerk of ——— county, Oklahoma, ex officio clerk of the district court of ——— county, Oklahoma, his application for the disqualification of the Honorable ———, judge of said court, in the trial of this case, and said application, a copy of which is attached to this notice, will be presented to the said Honorable ———, at the district court room in the county court house at ——— Oklahoma, on the ——— day of ———, 19—, at ——— o'clock ——— M., or as soon thereafter as counsel may be heard.

You will therefore govern yourselves accordingly.

———, Attorneys for Defendant, J. D.

Service of the above and foregoing notice is hereby acknowledged to have been made upon the above-named plaintiffs, A. M. and B. M., upon this ——— day of ———, 19—, at ——— o'clock ——— M., and receipt of a copy of the application for disqualification is also acknowledged to have been delivered simultaneously with the service of the above and foregoing notice.

———, Attorneys for Plaintiffs.

§ 43. Waiver of disqualifications

The disqualification of a judge is a matter of public policy and cannot be waived.[41] Where a special judge is elected or agreed upon in a particular case, which is not finally determined at the term at which he is elected or agreed upon, and he presides at a subsequent term at which his authority is recognized, any objections that he was not re-elected, or reagreed upon, are waived.[42] But the right of accused to a change of judge where the presiding judge is prejudiced against him, cannot be abrogated.[43]

§ 44. Acts of disqualified judge

On the filing by accused of an affidavit in proper time, stating that he cannot have a fair and impartial trial on account of the prejudice of the judge, such judge cannot thereafter perform any official act binding on accused except the allowance of such change of judge.[44]

A judge who is disqualified in a cause by reason of interest may enter a formal judgment directed by the appellate court, as in such case he is not required to exercise any judgment or discretion.[45] Where a trial judge is disqualified, he cannot make a valid order appointing a special county attorney upon the suggestion of the disqualification of the regular attorney.[46]

§ 45. Powers at chambers

"Judges of the district, superior and county courts shall, within their respective districts and counties, be authorized to hear and determine at chambers, motions to dissolve attachments." [47]

Division III.—District Courts and Judges

§ 46. District court—Where held

"The terms of the district court shall be held at the county seat of the respective counties." [48]

[41] Holloway v. Hall, 79 Okl. 163, 192 P. 219.
[42] Ex parte Elgan, 126 P. 584, 8 Okl. Cr. 75.
[43] Lewis v. Russell, 111 P. 818, 4 Okl. Cr. 129.
[44] Buchanan v. State, 101 P. 295, 2 Okl. Cr. 126.
[45] Cullins v. Overton, 54 P. 702, 7 Okl. 470.
[46] Dodd v. State, 115 P. 632, 5 Okl. Cr. 513.
[47] Rev. Laws 1910, § 5318.
[48] Const. Okl. art. 7, § 25.

§ 47. Districts and judges

The state is divided into district court judicial districts. Provision is made by statute for the time of holding terms of district court in various counties. In certain districts, provision is made for two or more judges.[49] Provision is made for two additional judges in the district composed of Pawnee and Tulsa counties.[50]

The state Constitution provides: "Until otherwise provided by law, the state shall be divided into twenty-one judicial districts and the qualified electors in each of the said districts shall elect a judge of the district court as provided herein, except in the Thirteenth judicial district two judges shall be elected. Such judge shall be a citizen of the United States, and shall have been a resident of the territory embraced within the state for two years, and of the territory comprising his district at least one year, prior to his election; and he shall have been a lawyer licensed by some court of record, or shall have been a judge of some court of record, or both such lawyer and judge, for four years next preceding his election, and shall reside in his district during his term of office. The term of office of the district judge shall be four years, and at the time of his election he shall have reached the age of twenty-five years. Regular terms of the district court shall be held in each organized county of this state at least twice in each year. The time of convening the district court in each county in this state, until the Legislature shall otherwise provide, and the duration of the term, shall be fixed by the Supreme Court of the state. The term of the district judges elected at the first election shall expire on the last day next preceding the second Monday in January, nineteen hundred and eleven, and the judges of the district court thereafter shall be elected at the general election next preceding the commencement of their terms of office.

"In case of the illness of the judge elected in any district, or if for any other cause he shall be unable to preside in the district in which he was elected, the Chief Justice may designate any district

[49] Rev. Laws 1910, §§ 1779, 1780, 1793; Sess. Laws 1910–11, pp. 176–178, §§ 1–12; Sess. Laws, 1913, p. 5, §§ 1–3; p. 64, §§ 1–3; p. 605, §§ 1–2; Sess. Laws 1915, p. 10, § 1; pp. 551, 552, §§ 1, 2; Sess. Laws 1917, p. 183, §§ 1, 2; p. 185, § 1; p. 187, § 1; pp. 201–205, §§ 1–11; Sess. Laws 1919, pp. 34, 55, §§ 1–3; pp. 115, 116, §§ 1–4; p. 336, §§ 1, 2; p. 403, § 1.

[50] Sess. Laws 921, p. 3 (S. B. No. 17), §§ 1–4.

judge, in the state to hold any term of court in said district in lieu of the judge elected to hold the courts of said district. When ever the public business shall require it, the Chief Justice may appoint any district judge of the state to hold court in any district, and two or more district judges may sit in any district separately at the same time. In the event any judge shall be disqualified for any reason from trying any case in his district, the parties to such case may agree upon a judge pro tempore to try the same, and, if such parties cannot agree, at the request of either party a judge pro tempore may be elected by the members of the bar of the district, present at such term. If no election for judge pro tempore shall be had, the Chief Justice of the state shall designate some other district judge to try such case." [51]

§ 48. Sessions—Time for—Adjournments

The terms of courts of record begin on the day fixed by law; and if the judge be not present in his court, or a judge pro tempore selected, within two days after the first day of the term, then the term lapses, and cannot thereafter be revived by the judge or any other officer of the court; and any attempted proceedings had in such court after the lapse of the term is coram non judice and void.[52] A district judge may hold court to hear matters which may be disposed of without a jury, though the court expense fund has been exhausted. The statute fixing the terms of the district courts of the state does not require a jury term to be held and expenses to be incurred, chargeable to the court expense fund, when that fund has been exhausted.[53]

The fact that the district court of one county was theoretically in session because it had not been adjourned sine die while the judge was presiding at a trial in another county in the same district did not amount to a violation of the old rule that two courts cannot be in session in the same district at the same time.[54] Nor were the proceedings of adjourned sessions of the district court coram non judice and void, notwithstanding the regular term in another

[51] Const. Okl. art. 7, § 9.

[52] Wilson v. State, 109 P. 289, 3 Okl. Cr. 714; Collins v. State, 114 P. 1127, 5 Okl. Cr. 254; Douglas v. Same, 114 P. 1128, 5 Okl. Cr. 682.

[53] State v. Stanfield, 126 P. 239, 34 Okl. 524.

[54] In re Dossett, 37 P. 1066, 2 Okl. 369.

county in the same district had intervened between the time of the adjournment and the convening of the adjourned session.[55]

Where a judge adjourns the court without fixing any time at which it should reconvene, it cannot again convene until the next regular session of the court;[56] but if the court is adjourned to a day certain, and the judge is unable to hold court on such day and, at a subsequent day, within the term, a session is held, the court is legally constituted and its proceedings are valid.[57]

The times for holding sessions of the district court in the counties of the fifth district were recently fixed by statute.[58]

§ 49. Change of district—Disposition of cases pending

"In any county detached from one judicial district and added to another, if there be any case pending in the district court of such county which has at any time been tried by the judge of said court, and by him taken under advisement, and still undecided, it shall be the duty of the judge who tried said cause to make and render his finding and judgment therein and to determine all the motions therein, and to allow and settle the case made therein or dispose of such case in all respects as though said county had not been detached from his district." [59]

§ 50. Special terms

"Special terms of the district court in any county in a district may be called by the resident judge of said district, by order entered of record in such court, notice of such special term to be given in at least two consecutive issues of a weekly newspaper published and of general circulation in such county, prior to the convening of such special term." [60]

§ 51. Adjournment of term

"The regular term of any district court may be adjourned from time to time, or sine die, by a resident judge of the district court or by any other district judge assigned and holding court in such district, but such adjournment shall be [to] a time prior to the con-

[55] In re Dossett, 37 P. 1066, 2 Okl. 369.
[56] Irwin v. Irwin, 37 P. 548, 2 Okl. 180.
[57] St. Louis & S. F. R. Co. v. James, 128 Pac. 279, 36 Okl. 196.
[58] Sess. Laws 1919, c. 281.
[59] Rev. Laws 1910, § 1781.
[60] Rev. Laws 1910, § 1795.

vening of the next regular term. The regular judge, or any judge assigned, may make all orders with reference to the adjournment of the term." [61]

§ 52. Two or more judges sitting at same time

"Two or more district judges may sit and hold court at the same time in the same county during term time; and regular terms or adjourned terms of court in two or more counties in the same judicial district shall proceed until the same are adjourned sine die." [62]

§ 53. Additional judge

"When, upon petition to the supreme court of the State of the majority of the county commissioners of the counties embraced in any judicial district in this state, it is made to appear that any district court within the state has such an unusual number of cases awaiting trial by such court that a thorough, prompt and effective administration of justice cannot be secured in said district, it shall become the duty of said court to recommend to the Governor the appointment of an additional judge for such district for such period as the court may consider necessary to meet the condition; and upon such recommendation the Governor shall appoint an additional judge for such district for the time recommended by the court." [63]

"Such additional judge shall possess like qualifications and powers and perform such duties and receive such compensation as provided by law for other district judges of this State." [64]

§ 54. District judges—Expenses

"All judges of the district court of the state of Oklahoma, shall be paid their actual and necessary traveling expenses while holding court outside of the county wherein said district judge permanently resides, when said district judge shall file an itemized

[61] Rev. Laws 1910, § 1794.
[62] Rev. Laws 1910, § 1796.
[63] Rev. Laws 1910, § 1782.
[64] Rev. Laws 1910, § 1783.

Act March 22, 1909 (Laws 1909, c. 14, art. 3) § 3, authorizing the Governor to appoint an additional district judge, held not a violation of Const. art. 7, § 9. In re Byrd, 122 P. 516, 31 Okl. 549; Oklahoma City Land & Development Co. v. Hare (Okl.) 168 P. 407.

statement of the expenses, sworn to, with receipts and vouchers attached, with the state auditor." [65]

"When any district judge is ordered by the chief justice to perform duties outside his district, said judge shall be entitled to his necessary and actual expense incident to the performance of such duties. Said judge, when so assigned outside his district, shall certify his expense account, as above provided, to the Chief Justice, and when such account is so certified and approved the state auditor is hereby authorized to issue his warrant on the state treasurer, to be paid out of any funds in the treasury not otherwise appropriated." [66]

§ 55. Reporter—Appointment—Qualifications

"The district judge in each judicial district shall appoint, whenever in his judgment it will expedite public business and tend to the more economical administration of justice, a shorthand reporter who shall be well skilled in the art of stenography and competent to perform the duties required of him, which competency shall be ascertained by the applicant writing correctly one hundred and fifty words per minute for five consecutive minutes in open court, the matter written not being previously known to him." [67]

§ 56. —— Duties of court reporter

"It shall be the duty of the court reporter to take down in shorthand and to correctly transcribe, when required, all the proceedings upon the trial of any cause, as well as all statements of counsel, the witnesses or the court, made during the trial of any cause or with reference to any cause pending for trial, when required by a party or attorney interested therein, and all other matters that might properly be a part of a case-made for appeal or proceeding in error. An attorney in any case pending shall have the right to request of the court or stenographer that all such statements or proceedings occurring in the presence of the stenographer, or when his presence is required by such attorney, shall be taken and transcribed. A refusal of the court to permit, or, when requested, to require any statement to be taken down by the stenographer, or transcribed after being taken down, upon the same being shown

[65] Sess. Laws 1919, c. 33, § 1.
[66] Rev. Laws 1910, § 1784.
[67] Rev. Laws 1910, § 1785.

by affidavit or other direct and competent evidence, to the supreme court, shall be deemed prejudicial error, without regard to the merits thereof." [68]

§ 57. —— Salary and fees

The district court reporter shall receive an annual salary of $1,800 per year.[69]

"In addition to the annual salary of said stenographer he shall charge and receive ten cents per folio for writing transcripts: Provided, that two carbon copies shall be furnished without charge." [70]

"The reporter shall, on the request of either party in a civil or criminal case, make out such transcript and deliver the same to the party desiring it, on payment of his fees therefor by such party at the rate of ten cents per folio, which shall be allowed as taxable cost." [71]

§ 58. —— Traveling expenses

"The reporter shall proceed from county to county where the district courts are held and shall be in attendance upon said courts to perform such duties as shall be required of him, and shall receive as traveling expenses for each mile actually and necessarily traveled in going to, and returning from each district court, to be paid by the county to which he travels, the sum of five cents per mile." [72]

§ 59. —— Tenure and oath of office

"The reporter shall hold his office at the pleasure of the judge appointing him, and his oath of office shall be filed in the office of the clerk of the district court." [73]

§ 60. —— Notes filed—Admissibility in evidence—Transcripts

"The shorthand reporter in any court of record shall file his notes taken in any case with the clerk of the court in which the cause was tried. Any transcript of notes so filed, duly certified by the reporter of the court who took the evidence as correct, shall be admissible as evidence in all cases, of like force and effect as testimony taken in the cause by deposition, and subject to the same

[68] Rev. Laws 1910, § 1786.
[69] Sess. Laws 1919, c. 211, § 1.
[70] Rev. Laws 1910, § 1787.
[71] Rev. Laws 1910, § 1789.
[72] Rev. Laws 1910, § 1790.
[73] Rev. Laws 1910, § 1791.

objection; a transcript of said notes may be incorporated into any bill of exceptions or case-made. On appeal it shall be the duty of the reporter to furnish such transcript when demanded, as required by law. If any reporter ceases to be the official reporter of the court, and thereafter makes a transcript of the notes taken by him while acting as official reporter, he shall swear to the transcript as true and correct, and when so verified the transcript shall have the same force and effect as if certified while he was official reporter." [74]

§ 61. Appeal to district court

"A judgment rendered, or final order made, by any tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court except where an appeal to some other court is provided by law." [75]

"An appeal may be taken to the district court from a judgment, decree or order of the county court:

"First. Granting, or refusing, or revoking letters testamentary or of administration, or of guardianship.

"Second. Admitting, or refusing to admit, a will to probate.

"Third. Against or in favor of the validity of a will or revoking the probate thereof.

"Fourth. Against or in favor of setting apart property, or making an allowance for a widow or child.

"Fifth. Against or in favor of directing the partition, sale or conveyance of real property.

"Sixth. Settling an account of an executor, or administrator or guardian.

"Seventh. Refusing, allowing or directing the distribution or partition of an estate, or any part thereof or the payment of a debt, claim, legacy or distributive share; or,

"Eighth. From any other judgment, decree or order of the county court in a probate cause, or of the judge thereof, affecting a substantial right." [76]

"If the judgment of a justice of the peace, taken on error, as herein provided, to the county or district court, be affirmed, it shall be the duty of such court to render judgment against the plaintiff

[74] Rev. Laws 1910, § 1792.
[75] Rev. Laws 1910, § 5235.
[76] Rev. Laws 1910, § 6501.

in error for the costs of suit, and award execution therefor; and the court shall thereupon order the clerk to certify its decision in the premises to the justice, that the judgment affirmed may be enforced, as if such proceedings in error had not been taken; or such court may award execution to carry into effect the judgment of such justice, in the same manner as if such judgment had been rendered in the county or district court." [77]

"When the proceedings of a justice of the peace are taken in error to the county or district court, in the manner aforesaid, and the judgment of such justice shall be reversed or set aside, the court shall render judgment of reversal, and for the costs that have accrued up to that time, in favor of the plaintiff in error, and award execution therefor; and the same shall be retained by the court for trial and final judgment, as in cases of appeal." [78]

"If the county or district court affirm a judgment on petition in error, it shall also render judgment against the plaintiff in error, for five per cent upon the amount due from him to the defendant in error, unless the court shall enter upon its minutes that there was reasonable grounds for the proceedings in error." [79]

§ 62. —— Party in default

Any party aggrieved may appeal from the county court, except where the decree or order of which he complains, was rendered or made upon his default.[80]

§ 63. —— Who may appeal

"A person interested in the estate or funds affected by the decree or order, who was not a party to the special proceeding in which it was made, but who was entitled by law to be heard therein, upon his application, or who has acquired, since the decree or order was made, a right or interest which would have entitled him to be heard, if it had been previously acquired, may also appeal as prescribed in this article. The facts which entitle such person to appeal, must be shown by an affidavit which must be filed with the notice of appeal." [81]

[77] Rev. Laws 1910, § 5264.
[78] Rev. Laws 1910, § 5265.
[79] Rev. Laws 1910, § 5277.
[80] Rev. Laws 1910, § 6502.
[81] Rev. Laws 1910, § 6503.

§ 64. —— When appeal must be taken

"An appeal by a party, or by a person interested who was present at the hearing, must be taken within ten days, and an appeal by a person interested, who was not a party and not present at the hearing, within thirty days from the date of the judgment, decree or order appealed from." [82]

§ 65. —— Appeal how taken

"The appeal must be made:

"First. By filing a written notice thereof with the judge of the county court, stating the judgment, decree, or order appealed from, or some specific part thereof, and whether the appeal is on a question of law, or of fact, or of both, and, if of law alone, the particular grounds upon which the party intends to rely on his appeal; and,

"Second. By executing and filing within the time limited in the preceding section, such bond as is required in the following sections. It shall not be necessary to notify or summon the appellee or respondent to appear in the district court, but such respondent shall be taken and held to have notice of such appeal in the same manner as he had notice of the pendency of the proceedings in the county court." [83]

This statute may be complied with by dictating into the record the notice of appeal, in open court, in the presence of appellee and his counsel, and by executing and filing the required appeal bond within ten days.[84] A motion for new trial is not required to confer jurisdiction upon the district court.[85]

The term "civil causes," or "civil cases," as used in the statute and Constitution, does not include matters within the probate jurisdiction of the county court.[86]

§ 66. —— Appeal bond

"The appeal bond shall be in such sum as the judge of the county court shall require and deem sufficient, with at least two sufficient sureties to be approved by the judge, conditioned that the appellant will prosecute his appeal with due diligence to a deter-

[82] Rev. Laws 1910, § 6504.
[83] Rev. Laws 1910, § 6505.
[84] In re Tubbee's Estate, 48 Okl. 410, 149 P. 1120.
[85] Welch v. Barnett, 34 Okl. 166, 125 P. 472.
[86] Welch v. Barnett, 34 Okl. 166, 125 P. 472.

mination, and will abide, fulfill and perform whatever judgment, decree or order may be rendered against him in that proceeding by the district court, and that he will pay all damages which the opposite party may sustain by reason of such appeal, together with all costs that may be adjudged against him." [87]

The appeal bond required on appeal from the county court to the district court in a probate proceeding is required not only to protect the rights of the appellee, but also on the ground of public policy and for other reasons.[88]

An appeal bond required by statute cannot be waived.[89]

§ 67. —— Stay of execution

"If the judgment, decree or order appealed from be for, or direct, the payment of money, or the delivery of any property, or grant leave to issue an execution, the appeal shall not stay the execution thereof, unless the appeal bond be furthermore conditioned to the effect that if the judgment, decree or order, or any part thereof be affirmed, or the appeal be dismissed, the appellant shall pay the sum so directed to be paid or levied, or, as the case may require, shall deliver the property so directed to be delivered, or the part thereof as to which the judgment, decree or order shall be affirmed." [90]

[87] Rev. Laws 1910, § 6506.

[88] Adair v. Montgomery (Okl.) 176 P. 911; Rev. Laws 1910, §§ 6504, 6505.

An administrator who appeals from an order of removal does not act in his representative capacity, so as to be within Gen. St. 1889, par. 2977, providing that "no executor or administrator shall be required to enter into a bond to entitle him to appeal." Coutlet v. Atchison, T. & S. F. R. Co., 52 P. 68, 59 Kan. 772; Erlanger v. Danielson, 26 P. 505, 88 Cal. 480; Mallory's Estate v. Burlington & M. R. Co., 36 P. 1059, 53 Kan. 557.

Administrator, appealing to district court from probate court's order charging him with interest on certain funds and deducting such charges from an allowance of compensation and directing distribution of estate, is required, by Gen. St. 1915, § 4678, to give a bond. In re Baird's Estate, 102 Kan. 317, 169 P. 1149.

[89] The appeal bond required on appeal from county court to district court in a probate proceeding is jurisdictional, and, without a statutory provision, cannot be waived by court or parties. Adair v. Montgomery (Okl.) 176 P. 911.

Where a case is tried in the probate court, and judgment rendered for plaintiff, and defendant attempts to appeal, without giving an appeal bond, and, after the transcript of the proceedings in the probate court is filed in the district court, plaintiff makes a timely motion to dismiss the appeal

[90] Rev. Laws 1910, § 6507.

"No proceeding to reverse, vacate or modify any judgment or final order of a justice of the peace shall operate as a stay of execution, unless the clerk of the district or county court, in which such proceeding is commenced, shall take a written undertaking to the defendant in error, executed on the part of the plaintiff in error, by one or more sureties, to be approved by the clerk, to the effect:

"First. When the judgment directs the payment of money, that the plaintiff will pay all costs which have accrued or may accrue in such proceedings in error, together with the amount of any judgment that may be rendered against the plaintiff in error, either upon and after the affirmance thereof in the district or county court, or on the further trial of the case in such court, after the judgment of the court below shall have been set aside or reversed.

"Second. When the judgment directs the delivery of the possession of lands or tenements by the plaintiff in error, he will not commit or suffer to be committed any waste thereon; and if the judgment be affirmed by the court above or if judgment be rendered against the plaintiff upon further trial of the case, after the judgment of the court below shall have been set aside or reversed, that he will pay double the value of the use and occupation of the property, from the date of the undertaking until the delivery of the property, pursuant to the judgment, and all damages and costs that may be awarded against him." [91]

On an appeal staying proceedings, the subject-matter involved is removed from the jurisdiction of the trial court until the appeal has been determined.[92]

§ 68. —— Commitment—How stayed

"An appeal from any judgment, decree or order directing the commitment of any person, does not stay the execution thereof, unless the appeal bond be also to the effect that if the judgment, de-

for the reason that no appeal bond was given to effectuate the appeal, and such motion is overruled, and the parties are required to go to trial, any appearance for the purpose of protecting his rights on the trial will not amount to a waiver of the giving of an appeal bond, or give the court the right to try and determine such cause. Vowell v. Taylor, 58 P. 944, 8 Okl. 625.

[91] Rev. Laws 1910, § 5256.

[92] Burnett v. Jackson, 111 P. 194, 27 Okl. 275. A county court has no jurisdiction pending an appeal to the district court from an order transferring a guardianship proceeding from that court to the county court of another county under Sess. Laws 1910, c. 25, to make certified copies of the orders

cree or order appealed from be affirmed, or the appeal be dismissed, the appellant shall, within twenty days after such affirmance or dismissal, surrender himself, in obedience to the judgment, decree or order, to the custody of the sheriff to whom he was committed. If the condition of such bond be violated, it may be prosecuted in the same manner and with the same effect as an administrator's official bond; and the proceeds of the action must be paid or distributed, as directed by the county court, to or among the persons aggrieved, to the extent of the pecuniary injuries sustained by them, and the balance, if any, must be paid into the county treasury.[93]

§ 69. —— Justification of sureties—Increased bond

"The provisions of sections 6262 to 6280, inclusive, apply to appeal bonds; and the respondent may apply to the appellate court or the judge thereof, upon notice, for an order requiring the appellant to increase the sum fixed by the judge of the county court, or to give additional security; and if the applicant make default in giving a new bond, pursuant to an order to increase the same, or to give additional security, the appeal may be dismissed." [94]

§ 70. —— Appeal bond form—Action upon

"Every appeal bond must be to the state of Oklahoma; must contain the name and residence of each of the sureties thereto, and must be filed in the county court. The judge of the county court may, at any time, in his discretion, make an order authorizing any person aggrieved to bring an action on the bond, in his own name or in the name of the state. When it is brought in the name of the state, the damages collected must be paid over to the county court, and therein distributed as justice may require." [95]

That a bond on appeal from a county court to the district court is made to the administrator instead of to the state does not render it void so as to defeat the district court's jurisdiction.[96]

and judgments and transmit the same, as its power to act therein is suspended by the appeal. Id.

[93] Rev. Laws 1910, § 6508.

[94] Rev. Laws 1910, § 6509.

[95] Rev. Laws 1910, § 6510.

[96] In re Barnes' Estate, 47 Okl. 117, 147 P. 504.

Despite Comp. Laws 1909, § 5460 (Rev. Laws 1910, § 6510), requiring bond on appeal from the county to the district court to be made payable to the

§ 71. —— Appeal not to stay issue of letters

"An appeal from the decree or order admitting a will to probate, or granting letters testamentary, or letters of administration, does not stay the issuing of letters where, in the opinion of the county judge, manifested by an entry upon the minutes of the court, the preservation of the estate requires that such letters should issue. But the letters so issued do not confer power to sell real property by virtue of any provision in the will, or to pay or satisfy legacies or to distribute the property of the decedent among the next of kin, until the final determination of the appeal." [97]

§ 72. —— Appeal not to stay order revoking letters, etc.

"An appeal from a decree or order revoking probate of a will, letters testamentary, letters of administration or letters of guardianship, or from a decree or order suspending or removing an executor, administrator or guardian, or removing or suspending a testamentary trustee or a person appointed by the county court, or appointing an appraiser of personal property does not stay the execution of the decree or order appealed from." [98]

§ 73. —— Proceedings

"The judge of the county court must, within ten days from the filing of the notice of appeal and the giving of the required bond, cause a certified copy thereof and of the judgment, decree or order, or specific part thereof appealed from, and of the minutes, records, papers and proceedings in the case, to be transmitted to the clerk of the district court of the county, to be filed in his office; and the appeal may be heard and determined at any day thereafter by said court, at any general, special or adjourned term; and if the appellant make no appearance when the case is called for trial, or otherwise fail to prosecute his appeal, the respondent may, on motion, have the appeal dismissed, or may open the record and move for an affirmance." [99]

state of Oklahoma, an appeal bond, otherwise in conformity with the statute, is valid. Barnett v. Blackstone Coal & Mining Co., 60 Okl. 41, 158 P. 588.

[97] Rev. Laws 1910, § 6511.

[98] Rev. Laws 1910, § 6512.

[99] Rev. Laws 1910, § 6513.

§ 74. —— Powers of the appellate court

"The plaintiff in the county court shall be the plaintiff in the district court, and when the appeal is on questions of law alone the appellate court may reverse, affirm or modify the judgment, decree or order, or the part thereof appealed from, and every immediate order which it is authorized by law to review, in any respect mentioned in the notice of appeal, and as to any or all of the parties, and it may order a new hearing. Upon such appeal, so much of the evidence as may be necessary to explain the grounds, and no more, may be certified into the appellate court." [1]

§ 75. —— Trial de novo

"When the appeal is on questions of fact, or on questions of both law and fact, the trial in the district court must be de novo, and shall be conducted in the same manner as if the case and proceedings had lawfully originated in that court; and such appellate court has the same power to decide the questions of fact which the county court or judge had, and it may, in its discretion, as in suits in chancery, and with like effect, make an order for the trial by jury of any or all the material questions of fact arising upon the issues between the parties, and such an order must state distinctly and plainly the questions of fact to be tried." [2]

A "trial de novo" has a well-defined and generally understood meaning, and does not contemplate the framing of new and different issues in the appellate court.[3] Thus on trial de novo in the district court, on appeal from the county court in probate matters, the district court can render only such judgment or make such order as the county court should have made.[4]

§ 76. —— Penalty for neglect of county judge to transmit record

"If the judge of the county court neglect or refuse to make or transmit such certified copies as are hereinbefore required to be

[1] Rev. Laws 1910, § 6514.

[2] Rev. Laws 1910, § 6515.

Appeal to district court from order of county court on questions of law and of fact, gives jurisdiction to determine matter de novo, and hearing therein is not simply a review to determine whether error of law was committed in court below. In re Standwaitie's Estate (Okl.) 175 P. 542.

Rev. Laws 1910, § 6501.

[3] Parker v. Lewis, 45 Okl. 807, 147 P. 310.

[4] Parker v. Lewis, 45 Okl. 807, 147 P. 310.

transmitted to the clerk of the district court in cases of appeal, he may be compelled by the district court by an order entered, upon motion, to do so; and he may be fined, as for contempt, for any such neglect or refusal. A certified copy of such order may be served upon the county judge by the party or his attorney." [5]

§ 77. —— Dismissal of appeal—Effect—Costs

"The dismissal of an appeal by the district court is in effect an affirmance of the judgment, decree or order appealed from; and when an appellant shall have given, in good faith, notice of appeal, but omits, through mistake, to do any other act necessary to perfect the appeal or to stay proceedings, the appellate court may permit an amendment, on such terms as may be just." [6]

"Such appellate court may award to the successful party the costs of the appeal; or it may direct that such costs abide the event of a new hearing, or of the subsequent proceedings in the county court. In either case the costs may be made payable out of the estate or fund, or personally by the unsuccessful party, as directed by the appellate court; or, if no such direction be given, as directed by the county court." [7]

"If the county or district court affirm a judgment on petition in error, it shall also render judgment against the plaintiff in error, for five per cent. upon the amount due from him to the defendant in error, unless the court shall enter upon its minutes that there was reasonable grounds for the proceedings in error." [8]

§ 78. —— Enforcement of decree

"When a judgment, decree or order, from which an appeal has been taken, is wholly or partly affirmed, or is modified by the judgment rendered by the district court upon such appeal, it must be enforced, to the extent authorized by the latter judgment, by the county court, in like manner as if no appeal therefrom had been taken; and the district court must direct the proceedings to be remitted for that purpose to the county court or to the judge thereof." [9]

[5] Rev. Laws 1910, § 6516.
[6] Rev. Laws 1910, § 6517.
[7] Rev. Laws 1910, § 6518.
[8] Rev. Laws 1910, § 5277.
[9] Rev. Laws 1910, § 6519.

§ 79. —— Executor's bond stands in place of appeal bond

"When an executor or administrator who has given an official bond appeals from a judgment, decree or order of the county court or judge, made in the proceedings had upon the estate of which he is administrator or executor, his said bond stands in the place of an appeal bond, and the sureties therein are liable as on such appeal bond." [10]

§ 80. —— Reversal for error not to affect lawful acts

"When the order or decree appointing an executor, or administrator, or guardian, is reversed on appeal for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate, performed by such executor, or administrator or guardian, if he have qualified, are as valid as if such order or decree had been affirmed." [11]

§ 81. Rules of district court

The district courts have authority to make necessary and reasonable rules governing the transaction of business therein, and a rule requiring that parties who desire that the court shall state in writing its findings of fact separately from its conclusions of law shall request the same at the commencement of the trial has been held not unreasonable or illegal in Kansas.[12]

Where a rule of the district court provides that demurrers and motions shall only be heard on certain days, the court, without agreement of counsel, cannot disregard the rule and hear a demurrer prior to the day it would regularly come on for hearing.[13] But the rules prescribed must not be unreasonable.[14]

[10] Rev. Laws 1910, § 6520.

[11] Rev. Laws 1910, § 6521.

[12] Schuler v. Collins, 65 P. 662, 63 Kan. 372.

[13] Holbert v. Patrick (Okl.) 176 P. 903.

[14] The district court of the territory of Oklahoma could not impose a rule requiring a party appealing a case from the probate court to the district court to deposit with the clerk of the district court a specified sum for clerk's costs conditioned that on the failure to do so the court should dismiss the appeal. Goodwin v. Bickford, 93 P. 548, 20 Okl. 91, 129 Am. St. Rep. 729; Nelson v. Lollar, 94 P. 176, 20 Okl. 291; Stone v. Clogston, 105 P. 642, 25 Okl. 162.

Division IV.—Superior Courts and Judges

§ 82. Superior courts in general

There is created and established by statute in certain counties of this state, a court of civil and criminal jurisdiction coextensive with the county to be known as the superior court of such county, which shall be a court of record and shall be held in the largest city of such county.[15]

Many of the superior courts heretofore established have been abolished.[16]

§ 83. Qualifications of judges—Term of office

"The said court shall be presided over by a judge whose qualifications shall be the same as are required for district judges and who shall be a resident of the county for which he shall have been elected or appointed. The regular term of such judge shall be four years and he shall within the county, have and exercise all the powers of a district judge and all the powers of a county judge, limited to the jurisdiction herein conferred."[17]

[15] Sess. Laws 1915, c. 20, § 1; Sess. Laws 1917, c. 135, §§ 1–21.

Sess. Laws 1909, c. 14, art. 7, under which the superior court of Pottawatomie county was organized, held constitutional. Parker v. Hamilton, 49 Okl. 693, 154 P. 65.

Sess. Laws 1917, c. 135, § 14, transferring all causes from district court to superior court of Okfuskee county, created by act and prescribing procedure, held unconstitutional. Diehl v. Crump (Okl.) 179 P. 4, 5 A. L. R. 1272.

Section 6 of Act March 22, 1913, entitled "An act amending section 1 of article 7 of chapter 14 of Session Laws 1909, etc." (Laws 1913, c. 77), applies to superior courts continued by said act until January, 1915, as well as to those continued indefinitely by the act. State v. Superior Court of Oklahoma County, 136 P. 424, 40 Okl. 120.

Special provision has been made by statute for the superior court of Okmulgee county and for the jurisdiction, judge, and terms of court thereof, and other matters pertaining thereto (Sess. Laws 1917, c. 131, §§ 1–15), as is also true of Creek county (Sess. Laws 1917, c. 138, §§ 1–15).

[16] Sess. Laws 1919, c. 116.

The superior court in all counties having a population in excess of 100,000 according to the last federal census is abolished, and all causes of which the district court has jurisdiction are transferred thereto by the statute. Likewise all causes of which the county court has exclusive original jurisdiction are transferred to such court. Sess. Laws 1921, c. 2 (S. B. No. 16) §§ 1–3.

[17] Sess. Laws 1915, c. 20, § 3.

The term of an appointee continues until his successor can be elected.[18]

§ 84. Election

At the general election of county officers every fourth year after the year 1918, "the qualified electors of such county wherein a superior court has been established, * * * shall elect a judge of said court for such county to serve from the second Monday of the following January until the second Monday of January four years thereafter and until his successor shall be elected and qualified." [19]

§ 85. Procedure—Juries—Appeals

"The procedure in said court shall follow the procedure that is or may be provided for the district court. The juries for said court shall be selected in the same manner as juries for the district court, and the jury commissioners of all counties in which a superior court is created by operation of this act, whenever they meet to make jury lists for the district court shall make an additional certified list of jurors of the same number as for the district court and mark the same 'Jury List No. 3, for the Superior Court,' and shall deliver the same to the court clerk, and said clerk and the sheriff of the county shall select from said list the jurors for the superior court in the same manner as for the district court, juries in said court shall be composed of the same number of men of the same qualifications as in the district court, and all laws relative to juries and jurors for district courts shall be, and are hereby made applicable to the said superior courts. Appeals from said court shall be taken to the Supreme Court of the state and to the Criminal Court of Appeals of the state, in the same manner as is now or may hereafter be provided by law for taking appeals from the district court to said appellate courts." [20]

§ 86. Court stenographer

"The judge of said court shall appoint a stenographer whose fees and compensation shall be the same as provided by law for like services rendered by the stenographer for the district court, and he shall be paid by the county in which the court is located, and

[18] State v. Breckinridge, 126 P. 806, 34 Okl. 649.

[19] Sess. Laws 1915, c. 20, § 5. [20] Sess. Laws 1915, c. 20, § 6.

the court clerk shall tax the same fee for stenographers as is provided by law for the payment of stenographers in district courts." [21]

§ 87. Sheriffs—County attorneys

"The county attorney and sheriff of every county wherein such a court shall be established shall appear in said court and therein perform all services for the state and county in the same manner, and exercise the same powers as provided by law in relation to the district court and processes issued therefrom." [22]

§ 88. Judge's salary

"The judge of the superior court of each county shall receive as full compensation the following salary; in counties having a population of not to exceed fifty thousand, the sum of two thousand eight hundred dollars per annum; and in counties in excess of fifty thousand in population, the sum of three thousand dollars per annum. The salary of such superior judge shall be paid out of the court fund of the county in which said superior court is located." [23]

§ 89. Transfer of causes

"The district court or judge thereof in any county wherein a superior court exists may, in his discretion, at any time transfer any cause pending and undetermined therein to the superior court of said county. The superior court or judge thereof may, at any time, in his discretion, transfer to the district court of said county any cause pending and undetermined therein which may be within the jurisdiction of the district court. The county court or judge thereof, may at any time, in his discretion, transfer any cause pending therein, except probate matters, to the superior court. Upon such transfer being made, such cause shall stand for trial in the court to which it has been so transferred as if it had been originally filed therein, and in such cases the court clerk shall transfer the original files to the court to which said cause has been so transferred." [24]

[21] Sess. Laws 1915, c. 20, § 8.

[22] Sess. Laws 1915, c. 20, § 9.

[23] Sess. Laws 1915, c. 20, § 10.

[24] Sess. Laws 1921, c. 250 (H. B. No. 22) § 1, amending Sess. Laws 1915, c. 20, § 15.

Laws 1915, c. 20, validating all proceedings of district courts in causes transferred thereto under Laws 1913, c. 77, validated transfer of a cause from superior court to district court having concurrent jurisdiction and subse-

Division V.—County Courts and Judges

§ 90. Procedure—Seal

"For the trial of all civil and criminal cases in the county court the pleadings, practice and procedure, both before and after judgment, shall be the same as that of the district court, except where special statutory proceedings are prescribed." [25]

The seal of the probate court, in the absence of legislation, became the official seal of the county court.[26]

§ 91. Terms of court

"In each county, commencing on the first Mondays of January, April, July and October of each year, except as otherwise herein provided, county court shall convene at the county seat and continue in session so long as business may require: Provided, that said courts shall always be open and in session for the transaction of all probate business in their respective counties." [27]

"In counties where it may be provided by law for such court to be held at a place or places other than the county seat, such court shall convene on the first Mondays of January, April, July and October of each year, at the county seat, and remain in session for a period of three weeks, and may then, by proper order of said court, be adjourned to such time as the judge thereof may deem proper: Provided, that the same shall not conflict with the term of said court provided for at any other place in said county; and provided, further, that said term of court cannot be adjourned to resume at a later date than eight weeks from the date of entering the order of such adjournment." [28]

"If there is only one place other than the county seat at which it is provided by law for holding terms of the county court, the

quent proceedings therein. Chicago, R. I. & P. Ry. Co. v. Austin, 63 Okl. 169, 163 P. 517, L. R. A. 1917D, 666.

A party to a civil action pending in the superior court who seeks to remove the cause to the district court under section 6 of the act of March 22, 1913 (Laws 1913, c. 77), must, under Act March 22, 1911 (Laws 1910–11, c. 121), amending Laws 1909, c. 14, art. 7, § 10, file his motion for such transfer before the cause is set for trial in the superior court. State v. Superior Court of Oklahoma County, 136 P. 424, 40 Okl. 120.

[25] Rev. Laws 1910, § 1821.

[26] Stewart v. State, 105 P. 374, 3 Okl. Cr. 618.

[27] Rev. Laws 1910, § 1823.

[28] Rev. Laws 1910, § 1824.

terms of said court at such place shall commence on the first Mondays of February, May, August and November of each year, and continue in session for the period of three weeks, if the public business requires it." [29]

"If there are two places in the county other than the county seat at which it is provided by law for holding terms of the county court in addition to the county seat, the terms of court shall be held at said place nearer the county seat as aforesaid, to wit: On the first Mondays in February, May, August and November of each year and continue in session as aforesaid. At the other place in said county where said county court is to be held other than at the county seat, terms of courts shall be held commencing on the first Mondays of March, June, September and December of each year, and continue in session for the period of three weeks each time, or so long as the public business may require." [30]

The statute merely commits to the sound discretion of the county court the power to adjourn the sessions of that court from time to time as business may require, and gives no power to prolong the term. An adjournment of the regular term at the county seat may be had to a day later than an intervening term provided for by law at some other place.[31]

Adjournment of the regular term without fixing in the order of adjournment any time at which the court shall reconvene precludes the court from again convening until the time fixed by law for the next regular session.[32]

Where terms of court are fixed by law, and the court fails to

[29] Rev. Laws 1910, § 1825.

[30] Rev. Laws 1910, § 1826.

Act of the Legislature of 1909, House Bill No. 460 (Laws 1909, c. 14, art. 20), providing for holding the county court at Prague, in Lincoln county, uses the words "term" and "session" interchangeably. Rakowski v. Wagoner, 103 P. 632, 24 Okl. 282.

Comp. Laws 1909, §§ 2008–2011 (Rev. Laws 1910, §§ 1824–1826), inclusive, fixing the terms of the county courts in the several counties of the state, embraces all the law on the subject and provides uniformity in the terms of such court in the several counties, and repeals Act March 12, 1909 (Laws 1909, c. 14, art. 13), fixing the terms of county court of Wagoner county at Coweta. In re James, 111 P. 947, 4 Okl. Cr. 94; In re Williams, 111 P. 950, 4 Okl. Cr. 101; In re Nichols, 111 P. 950, 4 Okl. Cr. 102.

[31] Tucker v. State, 139 P. 998, 10 Okl. Cr. 565.

[32] Baker v. Newton, 112 P. 1034, 27 Okl. 436.

convene at the time, the parties cannot, by agreement, confer jurisdiction to render a judgment at another time.[33]

Where proper officers assemble at the proper place, but at a time not authorized by law, they are not a court, and any judicial proceedings then had which can be had only in term time are void.[34]

The county courts are always in session for the transaction of probate business, and the part of the statute providing for terms of county courts has no application to probate jurisdiction of the courts.[35]

Where the general term of the county court has been once regularly convened on the day fixed by law, it continues until the time fixed by law for the next succeeding term, unless previously adjourned sine die.[36]

A general term of court, when regularly convened, can expire only by operation of law or by adjournment sine die. It will not expire by law until the first day of the next general term.[37] Failure of the judge to appear and hold a session on that day does not result in lapse of the term.[38]

§ 92. Proceedings in vacation—Out of court

A judgment in a civil action at a time when the court is not legally in session, is void for want of jurisdiction.[39]

"A judge of the county court, as contradistinguished from the county court, may exercise out of court all the powers expressly conferred upon him as judge." [40]

§ 93. Calendar

"The county judge shall on the first day of each term prepare a calendar of the cases standing for trial at said term, placing the causes on said calendar in the order in which the same are numbered on the docket and setting the cases for trial in such order upon convenient days during said term; and the provisions of the chap-

[33] American Fire Ins. Co. v. Pappe, 43 P. 1085, 4 Okl. 110.
[34] In re James, 111 P. 947, 4 Okl. Cr. 94; In re Williams, 111 P. 950, 4 Okl. Cr. 101; In re Nichols, 111 P. 950, 4 Okl. Cr. 102.
[35] Southern Surety Co. v. Chambers (Okl.) 180 P. 711.
[36] Tucker v. State, 139 P. 998, 10 Okl. Cr. 565.
[37] Brown v. State, 11 Okl. Cr. 498, 148 P. 181.
[38] St. Louis & S. F. R. Co. v. James, 128 P. 279, 36 Okl. 196.
[39] American Fire Ins. Co. v. Pappe, 4 Okl. 110, 43 P. 1085.
[40] Rev. Laws 1910, § 6192.

ter on civil procedure relative to the docket in district courts shall so far as they are applicable apply to said calendar." [41]

§ 94. Stenographer

"The judge of the county court may appoint, in writing, whenever in his judgment it will expedite public business, a shorthand reporter, to be known as 'County Stenographer,' who shall be ex officio deputy clerk of the county court, and who shall possess the same qualifications in the art of stenography as is required of such officer in the district court." [42]

§ 95. —— Duties

"It shall be the duty of the county stenographer, under the direction of the county judge, to take down in shorthand the oral testimony of witnesses, the rulings of the court, the objections made, and the exceptions taken during the trial of all civil and criminal cases, and also such other matters as the court shall order." [43]

§ 96. —— Oath and tenure of office

"County stenographers shall hold their offices at the pleasure of the county judge appointing them, and their official oath shall be filed in the office of the county court and be recorded in the journal of said court." [44]

§ 97. —— Fees for making transcripts

"The judge of the county court may, upon the application of either party, under the same terms and conditions as prescribed by law in the district court, direct such reporter to make out and file with the clerk of said court a transcript of his shorthand notes. The party ordering the transcript shall pay for the same at the same price and under the same terms and conditions as for like services in the district court, but all such fees shall be paid into the county treasury to the credit of the court fund." [45]

§ 98. —— Ex officio court clerk

"The county stenographer shall occupy and maintain his office in the office of the judge of the county court, and when such stenog-

[41] Rev. Laws 1910, § 1827.
[42] Rev. Laws 1910, § 1833.
Stenographer as deputy clerk, see Sess. Laws 1915, p. 41, § 1.
[43] Rev. Laws 1910, § 1834.
[44] Rev. Laws 1910, § 1835.
[45] Rev. Laws 1910, § 1836.

rapher is not engaged in reporting cases or making transcript, it shall be his duty, under the direction of the judge, to perform the the duties of a clerk in the county court." [46]

§ 99. —— Compensation

County court stenographers shall receive a salary to be paid by the county of not less than $100 nor more than $125 per month, to be fixed by the county board of commissioners.[47]

§ 100. Fees—Record

"The judge of the county court shall keep an account of all fees for services rendered by him, in a book provided for that purpose, showing the title or style of the case or proceedings in which such services were rendered, or the name of the person for whom rendered, the amount charged, and the amount received, from whom and for what purpose, and the date thereof. The footings for each quarter, at the close thereof, shall be legibly and correctly entered in such records, showing the amount received and the amount charged." [48]

§ 101. —— Report of

"The judge of the county court shall, on the first Mondays of January, April, July and October of each year, make out and present to the board of county commissioners a detailed statement of all fees received by him during the preceding quarter, together with the amount of fees earned, which remain unpaid, which report shall be made under oath and filed with the county clerk." [49]

§ 102. —— Fees paid to treasurer

"The judges of the county courts of the several counties shall, at the time of making their quarterly reports, pay into the county treasury all moneys received by them as fees during the three months immediately preceding the date of filing said report." [50]

§ 103. Special court towns

Special court towns are provided for by statute, where terms of county court shall be held in various counties in addition to the

[46] Rev. Laws 1910, § 1837.
[47] Sess. Laws 1921, c. 25 (S. B. No. 87), § 3; Rev. Laws 1910, § 1838, repealed.
[48] Rev. Laws 1910, § 1842.
[49] Rev. Laws 1910, § 1843.
[50] Rev. Laws 1910, § 1844.

county seat, and in such counties the jurisdiction of the county courts in the different towns is fixed and provision made for separate jury lists.[51]

§ 104. Judge—Term of office—Qualification

"There is hereby established in each county in this state a county court, which shall be a court of record; and, at the election to ratify this Constitution, there shall be elected in each county a county judge, who shall hold his office until the close of the day next preceding the second Monday in January, nineteen hundred and eleven; and thereafter the term of office of the county judge shall be two years, and he shall be elected at each biennial general election. The county judge shall be a qualified voter and a resident of the county at the time of his election, and a lawyer licensed to practice in any court of record of the state. The county judge shall be judge of the county court." [52]

§ 105. —— To give bond

"The county judge, before entering upon the duties of his office, shall enter into a bond to the state of Oklahoma for the use and benefit of the county, in a sum to be fixed by the board of county commissioners, which shall not be less than three thousand dollars nor more than ten thousand dollars, to be approved by the board of county commissioners, conditioned that he will faithfully discharge all the duties required of him by this chapter, and for the payment into the county treasury of all moneys that may come into his hands by virtue of his office as such county judge." [53]

[51] Rev. Laws 1910, c. 21, art. 2, §§ 1845–2050; Sess. Laws 1910–11, p. 57, §§ 1–5, p. 58, §§ 6–8, p. 59, §§ 1, 2, p. 60, §§ 3, 4, p. 61, §§ 5–7, p. 62, §§ 8, 9, p. 63, §§ 1–3, p. 64, §§ 4–7, p. 67, §§ 1, 2, p. 68, §§ 3–6, p. 69, § 7, p. 137, §§ 1–4, p. 138, §§ 5–7, p. 141, p. 239, §§ 1–4, p. 240, §§ 5–7, p. 241, §§ 8, 9; Sess. Laws 1913, p. 18, §§ 1, 2, p. 69, § 1, p. 70, §§ 2–3, 5, p. 71, §§ 6–8, p. 72, § 9, p. 134, §§ 1–3, p. 135, §§ 4, 5, p. 136, §§ 6, 7, p. 180, §§ 1–3, p. 181, §§ 4–6, p. 390, §§ 1, 2, p. 392, §§ 1, 2; Sess. Laws 1915, p. 15, § 1, p. 16, § 2, p. 62, §§ 1, 2, p. 63, §§ 4–7, p. 64, §§ 8, 9, p. 70, § 1, p. 71, §§ 2–4, p. 72, §§ 5–7, p. 109, §§ 1, 2, p. 153, §§ 1–3, p. 164, § 1, p. 165, §§ 2, 3, p. 166, §§ 4–6, p. 408, §§ 1–3, p. 433, §§ 1–3, p. 570, § 1, p. 571, §§ 1–5, p. 572, §§ 6–9, p. 573, §§ 10, 11, p. 626, § 1; Sess. Laws 1917, p. 187, § 1, p. 188, §§ 1, 2, p. 189, §§ 1–3, p. 215, § 1, p. 216, §§ 2–5, p. 217, § 6, p. 222, § 1, p. 223, §§ 2–6, p. 224, §§ 7–9.

[52] Const. Okl. art. 7, § 11.

[53] Rev. Laws 1910, § 1822.

§ 106. —— Office and records

"The judge of the county court shall keep his office at the county seat, in such rooms as the county may provide, and his office shall be kept open at reasonable hours. He shall safely keep all the papers, books and records of his office or relating to any case of business of the county court or before him as judge thereof, and receive and pay out, according to law, any money which by law may be payable to him. The county shall provide for such tables, desks, cases for books of record and other property or furniture required for his office." [54]

§ 107. —— Practice prohibited

"A judge of the county court shall not be counsel or attorney in any civil action for or against any executor, administrator, guardian, trustee, minor or other person over whom or whose accounts he has or by law would have jurisdiction, whether such action relate to the business of the estate or not." [55]

§ 108. Temporary county judge

"Whenever the county judge of any county is unable to perform the duties of his office because of illness, absence from the county, or other disqualification, a temporary judge may be chosen by the bar of the county and such temporary judge so chosen shall have the same authority and the same power as the regular judge." [56]

This statute and the Constitution provide for a judge pro tempore in a special proceeding.[57]

§ 109. —— How elected

"The clerk of the county court shall fix the time for the election of such temporary county judge, and shall serve a written notice on each member of the bar of the county at least forty-eight hours prior to such election. Such election shall be by ballot and shall be under the general direction of said clerk of the county court." [58]

§ 110. —— Fee when affidavit of bias made

"Whenever a temporary judge is chosen to sit as a trial judge in any case on account of bias or prejudice of the regular judge, the

[54] Rev. Laws 1910, § 1828.
[55] Rev. Laws 1910, § 1829.
[56] Rev. Laws 1910, § 1830.
[57] Hengst v. Burnett, 40 Okl. 42, 135 P. 1062.
[58] Rev. Laws 1910, § 1831.

party making the affidavit under the law shall be charged a fee of twenty-five dollars, to be taxed as costs in the case; and in no event shall the county be liable for more than one-half of such costs." [59]

Courts should use reasonable discretion in giving time to pay such costs, or file a bond for the same.[60]

§ 111. County judge—County attorney—Salary

The statute providing that "the county judge and county attorney of each county shall receive as full compensation the following salaries in counties having a population of not exceeding 7,000, the sum of $1,350.00 each per annum; in counties having a population of over 7,000 and not exceeding 10,000, the sum of $1,500.00 each per annum; and in addition to the foregoing, in all counties in excess of 10,000 inhabitants and not exceeding 20,000 inhabitants, the sum of $50.00 for each additional 1,000; in addition to the foregoing, in counties in excess of 20,000 and not to exceed 30,000 inhabitants, the sum of $25.00 for each additional 1,000; in addition to the foregoing, in counties of 30,000 inhabitants and not exceeding 40,000 inhabitants the sum of $15.00 for each additional 1,000; in addition to the foregoing, in counties of 40,000 inhabitants and not exceeding 50,000 inhabitants the sum of $10.00 for each additional 1,000; and in all counties in excess of 50,000 inhabitants the sum of $3,000.00 per annum," [61] is qualified by a statute recently enacted providing that "in all counties in this state having a population not less than 37,499 and not more than 37,750 as shown by the last Federal census, the county attorneys of any such counties on and after January 4th, 1923, shall be paid an annual salary of three thousand five hundred ($3,500.00) dollars, and the county

[59] Rev. Laws 1910, § 1832.

A county is not liable for the fee of a pro tempore county judge; there being no statute imposing such liability. Board of Com'rs of Oklahoma County v. Twyford, 39 Okl. 230, 134 P. 968. The provision of Rev. Laws 1910, § 1832, that "in no event shall the county be liable for more than one-half of such cost," is not enough, standing alone, to make a county liable for the fee of a pro tempore county judge. Id.

[60] Deninger v. Gossom, 46 Okl. 596, 149 P. 220.

[61] Sess. Laws 1910–11, p. 152, § 1, amending Rev. Laws 1910, § 1839.

The compensation of judges of the county courts in counties with a population of less than 20,000, under Const. Schedule, § 18 (Bunn's Ed. § 467), is, as provided by Sess. Laws Okl. 1903, p. 161, c. 14, § 1, the sum of $1,600, to

judges in such counties on and after January 4th, 1923, shall be paid an annual salary of three thousand ($3,000.00) dollars." [62]

§ 112. Court reporters

The statute providing for appointment of a county stenographer by county clerk on approval of county court confirmed by county commissioners, is mandatory, and proper administration of justice demands prompt compliance therewith by public officers.[63]

In counties having a population of 80,000 or less,[64] a county stenographer cannot retain fees for making transcripts of proceedings in the county court, but compensation for such services is limited to salary.[65]

§ 113. Rules for county court

The statute authorizes the Supreme Court to make rules relating to probate procedure [66] and binding on county courts.[67]

The county court cannot promulgate a rule requiring that a party appealing from a justice's court shall make a deposit with the clerk of the county court on costs accruing therein.[68]

Division VI.—Supreme Court and Judges

§ 114. Membership—Quorum—Eligibility—Term of office—Vacancies—Jurisdiction

The constitution provides "the Supreme Court shall consist of five Justices until the number shall be changed by law. The state shall be divided into five Supreme Court judicial districts until the Legislature shall change the number of members of the court, at which time the Legislature shall redistrict the state to conform to the number of Justices of the Supreme Court. From each of said districts, candidates for Justice of the Supreme Court shall be nominated by political parties, or by petitioners of the respective

be retained out of the fee received by him as judge. State v. Frear, 96 P. 628, 21 Okl. 397.

[62] Sess. Laws 1921, c. 64, § 1 (S. B. 281).

[63] Sess. Laws 1913, c. 161, § 2; Wiswell v. State, 14 Okl. Cr. 517, 173 P. 662.

[64] Sess. Laws 1919, p. 244.

[65] Board of Com'rs of Oklahoma County v. De Armond, 55 Okl. 618, 155 P. 592; Waide v. Atchison, T. & S. F. Ry. Co., 56 Okl. 38, 155 P. 884.

[66] Rev. Laws 1910, § 5347.

[67] State v. Kight, 49 Okl. 202, 152 P. 362.

[68] St. Louis & S. F. R. Co. v. McAllister, 56 Okl. 244, 155 P. 1123.

districts, in the manner provided by law, and such candidates shall be voted for by the qualified voters of the state at large, and no elector at such election shall vote for more than one candidate from each district. The candidate from each district receiving the highest number of votes cast in the state at said election shall be declared the Justice-elect in said district. A majority of the members of the Supreme Court shall constitute a quorum, and the concurrence of the majority of said court shall be necessary to decide any question. No person shall be eligible to the office of Justice of the Supreme Court unless he shall be at the time of his election a citizen of the United States and shall have been a resident of the territory embraced within the state for a period of two years, and of the territory comprising the district from which he is elected for a period of one year; and unless he shall have attained the age of thirty years and shall have been a lawyer licensed by some court of record, or shall have been a judge of some court of record, or such judge and lawyer together at least five years.

"The term of office of the Justices of the Supreme Court shall be six years, except as herein provided. Each member of such court shall be a conservator of the peace throughout the state; and in case of a vacancy in the membership of said court, the Governor shall, by appointment from the district, fill such vacancy until the next general election for State officers, and at such general election the vacancy for the unexpired term shall be filled by election by the qualified voters of the state." [69]

§ 115. Justices—Judicial districts—Election—Law clerks

"The Supreme Court shall consist of nine Justices." [70]

Provision is made by law for the division of the state into nine Supreme Court judicial districts,[71] and for the election of a Justice from each Supreme Court judicial district, and their terms of office fixed.[72]

Each Justice may appoint a law clerk, who shall be a competent stenographer and typist, at a salary of $1,200 per year, to assist such Justice in his clerical work and perform other duties.[73]

[69] Const. Okl. art. 7, § 3.
[70] Sess. Laws 1917, p. 232. § 1.
[71] Sess. Laws 1917, p. 232, § 2.
[72] Sess. Laws 1917, p. 232, § 3.
[73] Sess. Laws 1917, p. 233, § 5.

§ 116. Referees and first law clerk

Provision has been made by statute for two Supreme Court referees and one first law clerk as an assistant to the Chief Justice, and for their salary, appointment and qualifications.[74]

§ 117. Chief Justice—Election

"The Chief Justice of the Supreme Court shall be elected by members of the Supreme Court on the second Monday in January of each odd-numbered year. If for any reason the election of Chief Justice should not occur on the day mentioned, the court shall by order fix some day for such election. The Chief Justice when so elected shall hold office for two years, or until his successor is elected and qualified." [75]

§ 118. Vice Chief Justice—Election

"The members of the Supreme Court shall, at the time fixed by law for the election of a Chief Justice, or at such other time as may be necessary, elect one of their number as Vice Chief Justice, who shall perform the duties of the Chief Justice in his absence, sickness or inability to serve. The term of office of such Vice Chief Justice shall be concurrent with the Chief Justice presiding at the time of his election." [76]

§ 119. Justices—Not to be candidate for other office

"No Justice of the Supreme Court shall become during the term for which he may be elected or appointed, a candidate for any office other than a judicial position." [77]

§ 120. Commencement of term

"The term of office of the Justices of the Supreme Court shall commence on the second Monday of January following their election: Provided, however, that the term of office of the Justices elected at the first election under this Constitution shall commence upon the admission of the state into the Union, and shall continue as hereinafter provided. Those appointed or elected to fill vacancies shall enter upon the discharge of their duties as soon as they qualify." [78]

[74] Sess. Laws 1919, c. 127, § 2.
[75] Rev. Laws 1910, § 1750.
[76] Rev. Laws 1910, § 1751.
[77] Sess. Laws 1917, p. 233, § 7.
[78] Const. Okl. art. 7, § 4.

§ 121. Sessions—Opinions

"The sessions of the Supreme Court shall be held at the seat of Government, and the sessions and duration thereof shall be fixed by rule of said court, until fixed by the Legislature; but the first term of the Supreme Court shall be held within ninety days after the admission of the state. The Supreme Court shall render a written opinion in each case within six months after said case shall have been submitted for decision." [79]

§ 122. Chief Justice—Expiration of terms—Election

"At the first session of the Supreme Court the Justices thereof shall elect one of their number Chief Justice, who shall serve as Chief Justice until the expiration of his term of office; thereafter the Chief Justice shall be elected in the manner provided by law. Of the Justices elected at the first election, the term of two of them shall expire at the close of the day next preceding the second Monday in January, nineteen hundred and nine; and the term of two of the others shall expire at the close of the day next preceding the second Monday in January, nineteen hundred and eleven, and the term of the other Justice shall expire at the close of the day next preceding the second Monday in January, nineteen hundred and thirteen. The Supreme Court shall, by order duly entered in its minutes, provide the means of determining by lot the expiration of the terms of each of the Justices as hereinbefore provided, and shall determine in accordance therewith, and enter in the minutes of the court its order showing the expiration of the term of each of such Justices. After the first election, Justices of the Supreme Court shall be elected at the general biennial election next preceding the beginning of their respective terms." [80]

§ 123. Clerk

"There shall be elected by the qualified electors of the state at each election for Governor, a clerk of the Supreme Court, who shall be at least twenty-five years of age and a qualified elector of the state, and whose term shall be the same as that of the Govern-

[79] Const. Okl. art. 7, § 5.

As to divisions, opinions, jurisdiction, referees, and law clerks of the Supreme Court, see Sess. Laws 1919, p. 181, §§ 1–4.

[80] Const. Okl. art. 7, § 6.

or, and he shall give bond for faithful performance of his duty, as may be prescribed by law." [81]

§ 124. Law governing

"The appellate and the original jurisdiction of the Supreme Court shall be invoked in the manner now prescribed by the laws of the territory of Oklahoma until the Legislature shall otherwise provide." [82]

§ 125. Salaries of Justices

"The salary of each Justice of the Supreme Court and each Judge of the Criminal Court of Appeals shall be six thousand dollars ($6,000.00) per annum, payable monthly, as provided by law." [83]

§ 126. —— Effect of invalidity

Provision is made by statute that if the preceding clause fixing the salaries of Justices "shall be held by the Supreme Court of this State to be invalid as to Justices of the Supreme Court and Judges of the Criminal Court of Appeals now in office or any of them, such decision shall not affect the validity of said section one of this act as to Justices of the Supreme Court and Judges of the Criminal Court of Appeals hereafter elected or appointed; and it is hereby declared the intention of the Legislature that the salary of each Justice of the Supreme Court and each Judge of the Criminal Court of Appeals hereafter to be elected or appointed shall be six thousand dollars ($6,000.00) per annum, payable monthly as provided by law, whether this act as to the Justices of the Supreme Court and Judges of the Criminal Court of Appeals now in office or any of them shall be held invalid or otherwise." [84]

§ 127. Jurisdiction—Divisions

"The Supreme Court may by rules provide for two divisions of said court, each division to be constituted of any four Justices sitting with the Chief Justice, Vice Chief Justice, or any Justice designated by the Chief Justice or the Vice Chief Justice. Each of the divisions may sit, hear, consider, and determine causes and all questions which may arise therein, subject to the provisions herein contained as to hearings before the whole court. A concurrence of

[81] Const. Okl. art. 7, § 7.
[82] Const. Okl. art. 7, § 8.
[83] Sess. Laws 1919, c. 204, § 1.
[84] Sess. Laws 1919, c. 204, § 2.

a majority of the Justices of the whole court in the determination of any cause shall be necessary, and in case of a dissent in a division in the termination of any cause such cause shall thereupon be determined by the whole court. Causes involving the constitutionality of a statute shall be assigned for oral argument or submission before the whole court, and no former adjudication of the court shall be overruled or materially modified except upon conference of the whole court. Nothing in this section shall be construed as limiting the authority of the court to submit other causes to the whole court: Provided, that when any rule of the Supreme Court is in conflict with any law of this state, said rule shall have no effect." [85]

A statute has just been enacted conferring upon the Supreme Court an original jurisdiction in suits to enjoin the collection of illegal taxes for any state purpose and prescribing the procedure therein.[86]

§ 128. —— Appeals from county court

"Appeals and proceedings in error shall be taken from the judgments of county courts direct to the Supreme Court * * * in all cases appealed from justices of the peace, * * * and in all civil cases originally brought in the county court, in the same manner and by like proceedings as appeals are taken to the Supreme Court from judgments of the district court." [87]

§ 129. —— Appeals from Corporation Commission

Appellate jurisdiction is conferred upon the Supreme Court in this state to review the action of the Corporation Commission in making any order, or orders, in cases arising under the laws relating to the production and sale of crude oil or petroleum. "Such appeal may be taken by any person, firm or corporation, shown by the record to be interested therein, in the same manner and time as appeals are allowed by law from other orders of the Corporation Commission. Said orders so appealed from shall not be superseded by the mere fact of such appeal being taken, but shall be and re-

[85] Sess. Laws 1919, c. 127, § 1.
As to divisions, opinions, jurisdiction, referees, and law clerks of the Supreme Court, see Sess. Laws 1919, p. 181, §§ 1–4.
[86] Sess. Laws 1921, c. 31 (S. B. No. 134) §§ 1–9.
[87] Rev. Laws 1910, § 1819.

main in full force and effect until legally suspended or set aside by the Supreme Court." [88]

Appellate jurisdiction is conferred upon the Supreme Court of this state to review the order of said commission made under the laws relative to production and transportation of natural gas. "Such appeal may be taken by any person, firm or corporation shown by the record to be interested therein, in the same manner and time as appeals are allowed by law from other orders of the Corporation Commission. Said orders so appealed from, may be superseded by the commission or by the Supreme Court upon such terms and conditions as may be just and equitable." [89]

§ 130. —— Appeals from State Labor Commission

In all cases before the State Labor Commission arising under the Workmen's Compensation Law, "the award or decision of the commission shall be final and conclusive upon all questions within its jurisdiction between the parties, unless within thirty days after a copy of such award or decision has been sent by said commission to the parties affected, an action is commenced in the Supreme Court of the state to review such award or decision. Said Supreme Court shall have original jurisdiction of such action, and is authorized to prescribe rules for the commencement and trial of the same. Such action shall be commenced by filing with the clerk of the Supreme Court a certified copy of the award or decision of the commission attached to the petition by the complainant wherein the complainant or petitioner shall make his assignments or specifications as to wherein, said award or decision is erroneous and illegal. Said proceeding shall be heard in a summary manner and have precedence over all other civil cases in such court, except preferred Corporation Commission appeals. The commission shall be deemed a party to such proceeding and the Attorney General, without extra compensation, shall represent the commission therein. Such action shall be subject to the law and practice applicable to other civil actions cognizable in said court. Upon the final determination of said action in which the award or

[88] Sess. Laws 1915, p. 38, § 7. An appeal may be taken to the Supreme Court from a ruling of the State Corporation Commission. St. Louis-San Francisco Ry. Co. v. Teel (Okl.) 198 P. 78.

[89] Sess. Laws 1915, p. 401, § 7.

decision of the commission is sought to be reviewed, the commission shall make an order or decision in accordance with the judgment of said court. The commission shall not be liable for any costs apart from said proceeding, but otherwise the costs shall be taxed as in other cases." [90]

§ 131. —— Formation of new counties

Exclusive original jurisdiction is conferred upon the Supreme Court of Oklahoma over all controversies that may arise under the provisions of law for the formation of new counties and selection of county seats, "and any person affected by such election shall have a right to a hearing before the Supreme Court upon application filed and presented within thirty days after any such election shall be held." [91]

§ 132. —— Speedy hearing

"If any application for a hearing, upon any question arising after such election has been held, is filed with the Supreme Court, it shall be the duty of said court to make said matter special and give it precedence over the other business of said court, and consider and pass upon the same as speedily as is consistent with the business of said court." [92]

§ 133. Original jurisdiction—Division of assets and liabilities among counties

Original and exclusive jurisdiction is conferred by law upon the Supreme Court in all actions brought for the purpose of equitably dividing and distributing the property, assets and liabilities, derived through the process of taxation, bonds, warrants or other evidences of indebtedness, of any county formerly existing in the territory of Oklahoma, between such county and any new county or counties, and in all actions involving the custody of, or right to transcribe the tax rolls or other records of any such county, and the ownership and distribution of taxes assessed and collectable therein, and providing for the appointment of a special master in chancery in such cases.[93]

[90] Sess. Laws 1915, p. 586, art. 2, § 13.
[91] Sess. Laws 1910–11, p. 81, § 13; Rev. Laws 1910, § 1533.
[92] Sess. Laws 1910–11, p. 81, § 14; Rev. Laws 1910, § 1534.
[93] Sess. Laws 1917, p. 226, § 1, amending Rev. Laws 1910, § 1512.

§ 134. Parties—Proceedings

Any additional necessary party may be brought in on proper application and showing after expiration of the thirty days. The proceeding under this statute is a summary proceeding to contest county seat elections, exclusive jurisdiction being conferred upon the Supreme Court, and any city, town, or place, being a candidate for county seat at an election, has a right of hearing before the Supreme Court on application filed within thirty days after the election is held. The requirement that the petition be filed within thirty days is jurisdictional. There is no requirement of the statute that the county be a party to the proceeding.[94]

§ 135. Constitution

Section 6 of article 17 of the Constitution of Oklahoma providing for the relocation or removal of county seats of the different counties of the state, is self-executing, and it was not necessary to enact statutes in order that same might be enforced. The statute provides additional precautions and supplements the procedure.[95]

§ 136. Jurisdiction—Removal of state capital and normal schools

"Exclusive original jurisdiction is hereby conferred upon the Supreme Court of the state of Oklahoma, to hear and determine any action that may be brought involving the legality of the removal or location, or any attempt to remove or locate, the state capital or any normal school or other educational or charitable institution of the state, and in any such action the Supreme Court shall have the same power and jurisdiction, including the power to appoint a referee, which it now has under the laws of this state in contests over the location of county seats, and all such actions shall be governed by the same procedure which now prevails in county seat contests: Provided, that any resident taxpayer of this state, shall have a right to a hearing before the Supreme Court upon the execution of a good and sufficient bond for cost, to be approved by the clerk of the court. And, provided further that any and all actions brought under the provisions of this act shall be commenced within ten days after the passage of any act for the removal or location of the state

[94] Incorporated Town of Westville v. Incorporated Town of Stillwell, 24 Okl. 892, 105 P. 664.

[95] Incorporated Town of Westville v. Incorporated Town of Stillwell, 24 Okl. 892, 105 P. 664.

capital or any normal school or other educational or charitable institution of the state." [96]

§ 137. Jury trial, when

"In any cause in the Supreme Court wherein said court is exercising its original jurisdiction in which an issue of fact is presented properly triable by a jury, and either party to said cause demands a jury trial, or in cases of indirect contempts, if the accused demands a jury trial, said court shall not dismiss such cause for the reason that a jury is required, but shall proceed in the manner hereinafter prescribed." [97]

§ 138. —— Trial

"The Supreme Court may try said issue of fact in banc or may designate one of its members to preside at such trial; and a jury shall be secured as provided in the following section. The court or the justice trying the same shall conduct said trial, and the verdict therein shall be rendered in the same manner as the trial of issues of fact in civil causes in district courts." [98]

§ 139. —— Jury—How selected

"The Supreme Court, or the member thereof designated to try said issue of fact, shall by order direct the clerk of said court to issue an open venire for twenty-four persons having the qualification of jurors in the district court, to be drawn from the body of the state, which venire shall state the time and place said jurors shall appear. The venire shall be issued to and served and returned by the marshal of said court. If any of said jurors shall be disqualified to serve, the court may summon other jurors, in the manner provided by law, to complete said panel. Challenges shall be allowed to such jurors as in civil causes before the district court." [99]

§ 140. —— Costs—Witness fees

"The party demanding a jury shall deposit with the clerk of the Supreme Court a sum sufficient to pay the expenses of summoning the jury and the jurors' fees. The clerk, marshal, jurors and witnesses shall be entitled to the same fees and mileage as are allowed in the district court for like services. Witnesses may be notified by

[96] Sess. Laws 1910–11, p. 1, § 1.
[97] Rev. Laws 1910, § 1755.
[98] Rev. Laws 1910, § 1756.
[99] Rev. Laws 1910, § 1757.

the clerk by mail and shall be required to attend from any county in the state, if required by the party requesting such witness. The entire costs in the cause shall be adjudged against the losing party, or apportioned in such manner as the court may, in its discretion, direct. The court may require deposits from either party as the cause proceeds, to secure costs." [1]

§ 141. Reports

"The decisions and opinions of the Supreme Court shall be published in volumes and known as the 'Oklahoma Reports.' Each volume shall be labeled on the back, as follows: On a label near the top, the words 'Oklahoma Reports'; stamped in the center, the consecutive figure designating the number of the volume; and on a label near the bottom, the consecutive figure designating the number of the volume, the consecutive number designating the numerical order of the volume since statehood together with the word 'State,' the name of the reporter preparing the volume for publication, and the year or years in which the decisions and opinions contained in the volume were rendered." [2]

§ 142. Supreme Court rules

"The Justices of the Supreme Court shall meet every two years during the month of June, at the capital of the state, and revise their general rules, and make such amendments thereto as may be required to carry into effect the provisions of this code, and shall make such further rules consistent therewith as they may deem proper. The rules so made shall apply to the supreme court, the district courts, the superior courts, the county courts, and all other courts of record." [3]

[1] Rev. Laws 1910, § 1758.
[2] Rev. Laws 1910, § 8159.
[3] Rev. Laws 1910, § 5347.

ARTICLE II

OTHER COURT OFFICERS

Division 1.—In General

Sections
143. Compensation.
144. Deputies—Duties.
145. Bailiffs.

Division II.—Court Clerks

146. Office—Selection—Eligibility.
147. Official bond—Form.
148. Powers and duties—Contestants.
149. Liabilities.
150. Deputies.
151. Vacancies.
152. Fees and salaries.
153. Books to be kept.
154. Appearance docket.
155. Indorsements.
156. Execution docket.
157. Judgment docket.
158. Journal.
159. Files.
160. Cases—Court records.
161. Application of statute.
162. Journal entry—Order of sale—Homestead—Insane spouse.

Division III.—Sheriffs and Other Peace Officers

163. Sheriffs and deputies.
164. Service of writs and process—Amercement.
165. Substitute for sheriff.
166. Fees and salaries.
167. Power and duty.
168. Liability—Amercement.
169. Official bonds.
170. Acts of deputy.
171. Wrongful attachment.
172. Indemnity bonds.

Division IV.—Attorneys

173. Who permitted to practice—Examinations for admission.
174. Applicants to conform to rules—Fees for admission.
175. Examination—Commission.
176. Qualifications.
177. Persons not permitted to practice.
178. Attorneys from other states—How admitted.
179. Oath upon admission.

Sections
180. Foreign attorneys.
181. Duties.
182. Power, duty, and liability.
183. Implied authority—Tender—Compromise—Notice.
184. May receive money for client.
185. Proof of authority to appear.
186. Purchasing property.
187. Lien for services—Extent—Notice.
188. Fees.
189. Enforcement—Compromise without notice.
190. Amount which may be recovered.
191. May not become surety in action in which employed.
192. Lien—Release by giving bond.
193. Suspension of license—Disbarment.
194. Causes.
195. Defenses—Limitations.
196. Proceedings—How commenced.
197. Trial—Judgment.
198. Attorney and client in general.

Division I.—In General

§ 143. Compensation

Special provisions have been made at various times for the salaries and compensation of county officers, deputies, and assistants in particular counties,[4] and also for assistants to state officers.[5]

§ 144. Deputies—Duties

"Any duty enjoined by this code upon a ministerial officer, and any act permitted to be done by him, may be performed by his lawful deputy." [6]

§ 145. Bailiffs

A bailiff of a court of record is entitled only to a sum not exceeding that fixed by statute, and cannot claim additional compensation because his duties require him to remain in attendance during the nighttime.[7]

[4] Sess. Laws 1919, cc. 85, 86, 87, 90, 109, 114, 117, 132, 133, 136, 137, 140, 164, 165, 187, 213, 249, 250, 266, 271, 275, 294, 301.
[5] Sess. Laws 1919, c. 215.
[6] Rev. Laws 1910, § 5339.
[7] Board of Com'rs of McIntosh County v. Whitaker, 59 Okl. 232, 158 P. 1136.

Division II.—Court Clerks

§ 146. Office—Selection—Eligibility

The office of court clerk is a county office,[8] created by law, and provision is made for his salary and for the appointment of deputy court clerks and their salaries.[9]

In certain counties the court clerk is ex officio register of deeds.[10] The judge of the court has no authority to fill the office by appointment.[11]

A woman, otherwise qualified, is eligible to hold the office.[12]

§ 147. Official bond—Form

"Before entering upon the duties of his office the clerk of the district court shall give bond to the state of Oklahoma, in the sum of not less than two thousand dollars, nor more than ten thousand dollars to be fixed and approved by the board of county commissioners, conditioned for the faithful performance of his official duties, and for the accounting and paying over of all moneys by him received as such officer." [13]

Where a bond, voluntarily given by a clerk for a valid consideration, prior to the passage of the act requiring official bonds to be given by district clerks, named the state of Oklahoma as obligee, and was conditioned for the faithful performance of his official acts and for the accounting and paying over of moneys received by him as such officer, it was a valid and binding obligation, though not required by statute.[14]

OFFICIAL BOND

State of Oklahoma, } ss.:
County of ———. }

Know all men by these presents: That we, ———, as principal, and ———, ———, and ———, are held and firmly bound unto (1)

[8] Sexsmith v. Chappell, 130 P. 282, 35 Okl. 503; Beaty v. State, 130 P. 956, 35 Okl. 677.

[9] Sess. Laws 1915, pp. 5–7, §§ 1–4, amending Sess. Laws 1913, pp. 330–334, §§ 1, 5, 8, 9; Sess. Laws 1913, pp. 331, 332, §§ 2–4.

[10] Sess. Laws 1913, pp. 406, 407, §§ 1–3.

[11] Matney v. King, 93 P. 737, 20 Okl. 22; Ramsey v. Same, 93 P. 754, 20 Okl. 67.

[12] Gilliland v. Whittle, 127 P. 698, 33 Okl. 708.

[13] Rev. Laws 1910, § 5321.

[14] Ahsmuhs v. Bowyer, 39 Okl. 376, 135 P. 413, 50 L. R. A. (N. S.) 1060.

———, in the sum of (2) ——— dollars, for the payment of which we hereby bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Whereas, the above bounden ——— was duly (3) ——— to the office of ——— of the county of ———, in the state of Oklahoma, on the ——— day of ———, 19—:

Now, therefore, the condition of this obligation is such, that if the said ——— shall (4) ———, then this obligation shall be void; otherwise, to remain in full force and effect.

In testimony whereof, witness our hands, this ——— day of ———, 19—.

———.
———.
———.
———.

(Qualification of sureties.)

(1) At least three sureties required.
(2) Fill in statutory amount required for the office specified.
(3) Elected or appointed.
(4) Specify the bounden obligation.

§ 148. Powers and duties—Contestants

"The clerk of each of the courts shall exercise the powers and perform the duties conferred and imposed upon him by the statutes of this state, and by the common law. In the performance of his duties, he shall be under the direction of his court." [15]

"Justices of the peace and other judicial tribunals having no clerk, and the clerks of every court of record, shall, upon request, and being paid the lawful fees therefor, furnish an authenticated transcript of the proceedings containing the judgment or final order in said court, or of a case-made, to either of the parties to the same, or to any person interested in procuring such transcript." [16]

The clerk's duty in respect to recording proceedings, orders, judgments, and decrees is ministerial, and he acts under the exclusive jurisdiction and direction of his court.[17] He is the officer of the court, and in order to properly perform the duties devolving on him

[15] Rev. Laws 1910, § 5335.
[16] Rev. Laws 1910, § 5250.
[17] Hirsh v. Twyford, 139 P. 313, 40 Okl. 220.

by law it is the duty of the judge of the court to recognize him as such.[18]

An order of a district court, directing the clerk to pay certain money to a person named is a final order, and erroneous, where the record shows that the fund never came into the hands of the clerk, but into those of her predecessor, and was paid out by him under order of the court.[19]

The judge should recognize as clerk the person holding the prima facie title to the office.[20]

Where two persons claiming title to the office of clerk present their credentials to the judge of the district court, and each request the judge to recognize him as such clerk, it is the duty of the judge to examine such credentials to determine which one of the claimants holds the prima facie title to the office, and such examination does not constitute passing on the title to public office.[21]

§ 149. Liabilities

A clerk receiving moneys by virtue of his office holds the same in trust.[22] His bond is liable for all moneys coming into his hands as such clerk under the law and by virtue of his office and unaccounted for by him.[23]

Deposits made in court cases to secure costs which, as earned, belong to the county, are sums coming into the clerk's hands by virtue of his office, as are also sheriff's and stenographer's fees coming into the hands of a clerk of court and belonging to the county are received by virtue of his office, and hence his bond is liable for the failure to pay over same.[24]

Under the statute authorizing actions on official bonds,[25] the drawer of a certified check deposited in lieu of bail, can sue on the official bond of a district clerk who has cashed such check and em-

[18] Matney v. King, 93 P. 737, 20 Okl. 22; Ramsey v. Same, 93 P. 754, 20 Okl. 67.

[19] Sanderson v. Sanderson, 136 P. 791, 91 Kan. 98.

[20] Sanderson v. Sanderson, 136 P. 791, 91 Kan. 98.

[21] Sanderson v. Sanderson, 136 P. 791, 91 Kan. 98.

[22] Fidelity & Deposit Co. of Maryland v. Rankin, 124 P. 71, 33 Okl. 7.

[23] Hughes v. Board of Com'rs of Oklahoma County, 50 Okl. 410, 150 P. 1029; Southwestern Surety Ins. Co. v. Neal (Okl.) 197 P. 439.

[24] Hughes v. Board of Com'rs of Oklahoma County, 50 Okl. 410, 150 P. 1029.

[25] Rev. Laws 1910, § 5349.

bezzled the proceeds, though the clerk's bond was executed to the state of Oklahoma as obligee.[26] That the statute does not authorize the clerk to accept a certified check in lieu of a cash deposit mentioned in an order admitting to bail constitutes no defense in such action.[27]

No action will lie against a clerk in charge of the records of mechanics' and other liens, for a false certificate furnished a purchaser that there were no liens against the property purchased, where the only lien is one for materials furnished the grantor, which was filed against the land after it had been conveyed to the purchaser with warranty, for he cannot be injured by such certificate.[28]

§ 150. Deputies

A deputy clerk may perform the purely ministerial duties of the clerk in recording the list of jurors on the journal of the court and certifying to the correctness thereof.[29]

§ 151. Vacancies

Where the clerk is suspended under the statute authorizing same,[30] the county commissioners may fill the temporary vacancy, and the appointee, after qualifying, may perform duties of office during suspension.[31]

§ 152. Fees and salaries

The federal fee bill was not continued in force after statehood, and hence clerks of courts of the state were not entitled to receive a fee of $5 per day for attending court.[32]

The court clerk receives the same salary as did the district court clerk.[33]

[26] Ahsmuhs v. Bowyer, 39 Okl. 376, 135 P. 413, 50 L. R. A. (N. S.) 1060.

[27] Id.

[28] United States Wind Engine & Pump Co. v. Linville, 23 P. 597, 43 Kan. 455.

[29] Tegeler v. State, 9 Okl. Cr. 138, 130 P. 1164.

[30] Rev. Laws 1910, §§ 5605, 5606.

[31] Smith v. State, 13 Okl. Cr. 619, 166 P. 463.

[32] Hughes v. Board of Com'rs of Oklahoma County, 50 Okl. 410, 150 P. 1029; Board of Com'rs of Grant County v. Ernest, 45 Okl. 725, 147 P. 322; Hughes v. Board of Com'rs of Oklahoma County, 50 Okl. 410, 150 P. 1029.

An allowance by the board of county commissioners of $5 per day to the

[33] Board of Com'rs of Oklahoma County v. Beaty, 53 Okl. 393, 156 P. 1181; In re Laing, 143 P. 665, 43 Okl. 598.

The clerk cannot recover for making a transcript different from that ordered.[34]

Where the county commissioners paid a district court clerk a per diem fee for attending sessions for which there was no statutory authority, such payments may be recovered from the clerk.[35]

§ 153. Books to be kept

"The clerk of the district court shall keep an appearance docket, a trial docket, a journal, a judgment docket, an execution docket, and such other books as may be ordered by the court or required by law." [36]

§ 154. Appearance docket

"On the appearance docket he shall enter all actions in the order in which they are brought, the date of the summons, the time of the return thereof by the officer, and his return thereon, the time of filing the petition, and all subsequent pleadings and papers, and an abstract of all judgments and orders of the court." [37]

§ 155. Indorsements

"He shall indorse upon every paper filed with him, the day of filing it; and upon every order for a provisional remedy, and upon every undertaking given under the same, the day of its return to his office." [38]

§ 156. Execution docket

"In the execution docket the clerk shall enter all executions as they are issued by him. The entry shall contain the names of the parties, the date and amount of the judgment and costs, the date of the execution, and the name of the county to which it is issued. The clerk shall also record in full the return of the sheriff to each execution; and such record shall be evidence of such return, if the original be mislaid or lost." [39]

district clerk for attending court held void. Board of Com'rs of Grant County v. Ernest, 45 Okl. 725, 147 P. 322.

[34] Lawson v. Guthrie, 137 P. 1186, 40 Okl. 598.

[35] Harper v. Board of Com'rs of Oklahoma County, 54 Okl. 545, 149 P. 1102.

[36] Rev. Laws 1910, § 5322.

[37] Rev. Laws 1910, § 5323.

[38] Rev. Laws 1910, § 5331.

[39] Rev. Laws 1910, § 5326.

§ 157. Judgment docket

"The judgment docket shall be kept in the form of an index in which the name of each person against whom judgment is rendered shall appear in alphabetical order, and it shall be the duty of the clerk immediately after the rendition of a judgment to enter on said judgment docket a statement containing the names of the parties, the amount and nature of the judgment and costs, and the date of its rendition, and the date on which said judgment is entered on said judgment docket; and if the judgment be rendered against several persons, the entry shall be repeated under the name of each person against whom the judgment is rendered in alphabetical order." [40]

§ 158. Journal

"On the journal shall be entered the proceedings of the court of each day, and all orders of the judge in vacation or at chambers, and also all judgments entered on confession or default." [41]

§ 159. Files

"It is the duty of the clerk of each of the courts to file together, and carefully preserve in his office, all papers delivered to him for that purpose, in every action or special proceeding." [42]

§ 160. Cases—Court records

"He shall keep the papers in each case, separate, carefully enveloped in a wrapper, labeled with the title and number of the case." [43]

"He shall keep the records and books and papers appertaining to the court, and record its proceedings." [44]

§ 161. Application of statute

"The provisions of this article shall as far as they are applicable, apply to the clerk of all courts of record." [45]

§ 162. Journal entry—Order of sale—Homestead—Insane spouse

If the court shall make an order authorizing the sale of the homestead where one spouse is insane, such order "shall be entered upon the minutes of the court, and thereafter the sale, conveyance

[40] Rev. Laws 1910, § 5325.
[41] Rev. Laws 1910, § 5324.
[42] Rev. Laws 1910, § 5329.
[43] Rev. Laws 1910, § 5330.
[44] Rev. Laws 1910, § 5333.
[45] Rev. Laws 1910, § 5334.

or mortgage made in pursuance of such order shall be as valid and effectual as if the property affected thereby was the absolute property in fee simple of the person making such sale, conveyance or mortgage." [46]

Division III.—Sheriffs and Other Peace Officers

§ 163. Sheriffs and deputies

The duties and salary of sheriffs and their deputies are prescribed by statute.[47]

§ 164. Service of writs and process—Amercement

"The sheriff in person, or by his undersheriff or deputy, shall serve and execute, according to law, all process, writs, precepts and orders issued or made by lawful authorities, and to him directed, and shall attend upon the several courts of record held in his county." [48]

"He shall execute every summons, order or other process, and return the same as required by law; and if he fail to do so, unless he make it appear to the satisfaction of the court that he was prevented by inevitable accident from so doing, he shall be amerced by the court in a sum not exceeding one thousand dollars, upon motion and ten days' notice, and shall be liable to the action of any person aggrieved by such failure." [49]

§ 165. Substitute for sheriff

"The court or judge, or any clerk, in the absence of the judge from the county, for good cause, may appoint a person to serve a particular process or order, who shall have the same power to execute it which the sheriff has. The person may be appointed on the application of the party obtaining the process or order, and the return must be verified by affidavit. He shall be entitled to the same fees allowed to the sheriff for similar services." [50]

[46] Rev. Laws 1910, § 1149.

[47] Rev. Laws 1910, §§ 3198–3202; Sess. Laws 1910–11, pp. 27–29, §§ 1–4; Sess. Laws 1921, p. 82.

[48] Rev. Laws 1910, § 1699.

[49] Rev. Laws 1910, § 5337.

[50] Rev. Laws 1910, § 5320.

Where a sheriff is in his office ready to serve process issued by the probate judge, and the sheriff's office is in the same building, the probate judge is

A requirement that the appointment of a deputy sheriff shall be filed with the county clerk, is directory, and failure to file the appointment actually made will not invalidate it nor the official acts of the deputy.[51]

The appointment of a person by the sheriff to serve a summons must be in writing.[52]

§ 166. Fees and salaries

The fees and salaries of sheriffs, constables, jailers, and deputies have been recently fixed by statute.[53]

A county is not liable to a deputy sheriff for $3 per day for services as guard while carrying persons adjudged insane to the state hospital for the insane.[54]

Where a sheriff takes charge of property under an order of replevin, he can only be allowed for caring for the same while he is in possession thereof, and his return on an order of replevin is conclusive as to him as to the length of time such property was in his possession.[55]

A sheriff is not entitled to a commission in connection with a foreclosure sale, where the mortgagee is the purchaser, and the entire amount of the purchase price is applied as a credit upon the judgment.[56]

There is no provision of law requiring the payment of fees in advance to an officer for serving subpœna in a criminal case.[57]

without authority to appoint a special sheriff to serve the process. Skinner v. Board of Com'rs of Cowley County, 66 P. 635, 63 Kan. 557.

An appointment of a special officer to serve process in attachment, made by the clerk of the district court, upon an application which did not show that the court was not in session in the county, or that the judge was absent therefrom, and which failed to show that the sheriff and his deputies were interested in the proceeding, out of the county, or in any way disqualified to act, but contained as an only reason that the plaintiffs' attorney had looked with diligence for the sheriff or his deputy, but in vain, and that it was important that papers should be served at once, is unauthorized, and a levy thereunder invalid. Dolan v. Topping, 32 P. 1120, 51 Kan. 321.

[51] Orchard v. Peake, 77 P. 281, 69 Kan. 510.

[52] Baxter v. Yeagley, 8 Kan. App. 657, 56 P. 509. See Rev. Laws 1910, §§ 1695, 1696.

[53] Sess. Laws 1921.

[54] Board of Com'rs of Garfield County v. Bebb, 52 Okl. 18, 152 P. 595.

[55] Allen Dudley & Co. v. Clevenger, 19 Okl. 208, 91 P. 908.

[56] Berry v. Kiefer, 38 Okl. 377, 133 P. 1126.

[57] Thompson v. State, 118 P. 614, 6 Okl. Cr. 334.

A county is liable to a deputy sheriff for only 60 per cent. of the mileage earned by him in serving or attempting to serve criminal process.[58]

§ 167. Power and duty

The right of a sheriff who has sold property at judicial sale to sue the purchaser for the amount of the bid, after paying the amount to which the judgment creditor was entitled out of the proceeds of the sale, is not defeated by the expiration of his term of office.[59]

The sheriff of a county in which judgment was entered, and from a portion of which a new county was formed, had no authority to levy on and sell real estate in the new county; and a deed executed by him under an order of sale was void.[60]

A sheriff in whose hands an attachment order is placed, and to whom personal property is pointed out by the creditor as belonging to the debtor, and to whom a bond is tendered indemnifying him against the consequences of a levy on such property, is not, by reason of such facts, required to make the levy, if in good faith he believes it would be wrongful. He may refuse to make it, and in justification of his refusal may prove the existence of valid liens on the property to an amount exceeding its value.[61]

§ 168. Liability—Amercement

An "amercement" is a money penalty in the nature of a fine imposed on an officer for some misconduct or neglect of duty, and is a statutory proceeding, and the statutes relating thereto must be strictly construed.[62] Before an officer can be amerced, it must appear that a valid judgment has been entered, that it has not been satisfied, that the creditor or some one acting for him has filed a præcipe for execution, that an execution has been delivered to the officer, and he has failed to serve or return it.[63]

[58] Board of Com'rs of Grady County v. Castleman (Okl.) 166 P. 891.

[59] Trustees', Executors' & Securities' Ins. Corp. v. Bowling, 44 P. 42, 2 Kan. App. 770.

[60] Farmers' State Bank of Ingersoll v. Wilson, 127 P. 395, 34 Okl. 755.

[61] Phelps, Dodge & Palmer Co. v. Skinner, 65 P. 667, 63 Kan. 364.

[62] Stein v. Scanlan, 34 Okl. 801, 127 P. 483, 42 L. R. A. (N. S.) 895.

[63] Id.

Where a judgment was entered for $211, and no costs, and the execution showed the judgment to be for $211 and $184 costs, and no effort was made

Where property is struck off to a bidder who refuses to pay the amount of his bid, and the sheriff, instead of rescinding the contract and reselling the property, treats the sale as consummated, and

to supply the omission, there was such a variance as would prevent the court from entering a judgment in amercement for the full amount. Stein v. Scanlan, 34 Okl. 801, 127 P. 483, 42 L. R. A. (N. S.) 895. Where a judgment recites that it was rendered May 11, 1909, and execution shows that it was rendered May 13, 1909, the court will not render judgment of amercement against the sheriff for failure to return the execution. Id.

Where an execution shows that the judgment on which it purports to have been issued is for an amount greater than the actual judgment in the case, the officer to whom it is issued is not liable for neglecting to return it until after its return day. Fisher v. Franklin, 16 P. 341, 38 Kan. 251.

Where by mistake of the clerk, certain costs are erroneously taxed and indorsed on an execution, the sheriff, after selling land under it, cannot be amerced at the instance of the execution creditor for retaining the amount of such costs. Kothman v. Prest, 8 P. 228, 34 Kan. 179.

Under a judgment entered October 14, 1885, the sheriff is not liable to amercement for failing to serve and return, in 60 days, an execution reciting the judgment as rendered on October 14, 1886. Bittman v. Mize, 25 P. 875, 45 Kan. 450.

Where a plaintiff is seeking to amerce a sheriff for his neglect or failure in returning an execution, the execution, to sustain such a proceeding, must conform strictly to the judgment rendered. Fuller v. Wells, Fargo & Co., 22 P. 561, 42 Kan. 551; Gleason v. Itten, 34 P. 892, 52 Kan. 218.

On a motion to amerce a sheriff for failure to serve an execution, where it appears that the judgment on which the execution was based had been in fact satisfied, and where it further appears that at the time of the hearing of the motion to amerce, a judgment had been duly entered canceling the judgment on which the execution issued, the trial court did not err in overruling the motion. Union Stove & Mach. Works v. Caswell, 32 P. 362, 50 Kan. 787.

Where the execution commands the sheriff to collect a sum in excess of that named in the judgment, the sheriff cannot be amerced for failure to return the same within the time allowed. Reese v. Rice, 41 P. 218, 1 Kan. App. 311. In proceedings to amerce a sheriff for failure to return an execution within 60 days, an affidavit of the clerk of court, who received the execution by mail, that it arrived June 12th, and the fact that the postmark on the envelope in which the execution was returned showed that it was mailed June 11th, do not overcome the indorsement on the writ that it was returned June 4th, and the indorsement of the return by the clerk of the court, with which it was filed before being mailed that it was filed on that day, and the affidavit of the sheriff that it was mailed on the day on which it was returned. Id.

Where the successful bidder at a sheriff's sale repudiated the sale on account of an omission in the advertisement, and the sheriff duly returned the order of sale, with a certificate of the facts thereon, and afterwards another order of sale was issued, the fact that the property sold for a much less sum than at the first sale did not constitute a failure on the part of the sheriff to

surrenders possession of the property to the purchaser, he thereby makes himself liable for the amount of the bid.[64]

When a sheriff fails to make return of a writ of execution, as required by statute, the court must amerce him whether his omission results from willful wrong or mere neglect, and whether it has resulted in actual injury or not.[65]

Where a special execution commands the sheriff to pay all taxes on the land, and a purchaser agrees with the judgment creditor, before confirmation of the sale, to pay all delinquent taxes, and, in pursuance thereof, buys the outstanding tax certificates, the sheriff having no authority, after confirmation of the sale, to pay the taxes, if he does so, with knowledge of all the facts, and against the objections of the party interested, he may be amerced.[66]

Where on demand for the return of property levied on, which property exceeds the amount exempt, there is no effort to make a selection the judgment debtor cannot recover damages in a subsequent replevin action against the officer.[67]

Where a judgment is rendered in one county, and an execution is issued thereon to the sheriff of another county, and such sheriff fails to return the execution, as required by law, proceedings to amerce such sheriff can be maintained only in the court out of which the execution was issued.[68]

In proceedings against a sheriff for removal for corruptly refusing to collect a tax warrant, it was not necessary to show that the tax warrant was in all respects legal, if it was regular on its face and issued by a competent officer in discharge of his duty.[69]

Where the court has jurisdiction over the subject-matter, and the process is regular on its face, it affords complete protection to the officer executing it.[70]

execute the first order, so as to subject him to the amercement. Moore v. Burdge, 52 P. 912, 7 Kan. App. 80.

[64] Walker v. Braden, 9 P. 613, 34 Kan. 660.

[65] Henderson-Sturges Piano Co. v. Smith, 33 Okl. 335, 125 P. 454, citing Rev. Laws 1910, § 5180.

[66] Kothman v. Prest, 8 P. 228, 34 Kan. 179.

[67] Parsons v. Evans, 44 Okl. 751, 145 P. 1122, L. R. A. 1915D, 381.

[68] Fisher v. Franklin, 16 P. 341, 38 Kan. 251; Reynolds v. Nelson, 19 P. 353, 40 Kan. 41.

[69] Rutter v. Territory, 68 P. 507, 11 Okl. 454.

[70] Holdredge v. McCombs, 56 P. 536, 8 Kan. App. 663.

It is the duty of a ministerial officer to whom a search warrant is directed

However, where a constable illegally exercises authority under a legal writ of replevin, so as to warrant the conclusion that he intended from the first to use the authority as a cover for illegal conduct, he is liable as a trespasser ab initio.[71]

§ 169. —— Official bonds

Sureties on the official bond of a sheriff are only answerable for acts of their principal while engaged in performance of some duty imposed on him by law, or for an omission to perform such duty. That an officer, in doing an act claimed to be a breach of his bond, claimed to act in an official capacity, is not sufficient to show color of office, without proof that he was armed with a writ, or, if the writ was void, that there was a statute authorizing the act to be done without process.[72]

A sale was made and duly returned, but before the confirmation thereof the term of office of the sheriff expired, and he was re-elected to the office. Afterwards such sale was confirmed and the property conveyed to the purchaser. The court held that the bondsmen on the sheriff's bond for his second term are not liable for the money the sheriff ought to have received, but did not receive, during his first term of office.[73]

to execute the writ as demanded, if the same is issued by an officer having authority, and is regular on its face, and in such a case the writ is a protection to the officer. Kniseley v. Ham, 136 P. 427, 39 Okl. 623, 49 L. R. A. (N. S.) 770.

Where a search warrant was void because wrongfully issued, it could afford no justification to any officer in making a search. Duncan v. State, 11 Okl. Cr. 217, 144 P. 629. An attempt to make a second search on a warrant once served, makes a trespasser of the officer attempting the search, though the warrant was originally valid. Id.

[71] Wurmser v. Stone, 40 P. 993, 1 Kan. App. 131.

[72] Jordan v. Neer, 125 P. 1117, 34 Okl. 400.

Constables.—Sureties on the bond of a constable are answerable only for his acts while engaged in some duty imposed by law, or from omission to perform such duty. Inman v. Sherrill, 116 P. 426, 29 Okl. 100.

Constables and sureties are liable for misapplication of funds from check seized under attachment, where constable serves copy of attachment and takes possession of property, though he fails to properly complete levy and return. Williams v. Arends, 57 Okl. 556, 157 P. 313.

A redelivery bond taken by a constable, who did not levy the writ and who has no possession thereunder, is not taken by him in his official capacity, and his approval imposes no liability on his official bond. Burton v. Doyle (Okl.) 165 P. 169.

[73] Studebaker v. Johnson, 21 P. 271, 41 Kan. 326, 13 Am. St. Rep. 287.

§ 170. —— Acts of deputy

Where a deputy sheriff makes a levy on property not authorized by the writ of execution, the sheriff is also responsible with him for damages.[74]

That a deputy sheriff becomes angered in the discharge of his duty does not deprive his subsequent acts of their official character. Nor does the fact that he momentarily abandons his efforts to arrest a person without a warrant render the resumption of this duty any the less an official act. Where a deputy sheriff, in attempting to make an arrest without a warrant, kills a person guilty of a misdemeanor, to prevent him from escaping, the sheriff and his bondsmen are liable.[75]

Where a person is illegally shot by deputy sheriffs, the sheriff may be made liable by proof that he was also present, aiding, abetting, and encouraging the act of the deputies.[76]

§ 171. —— Wrongful attachment

Where a sheriff levies an attachment on part of a stock of goods, and holds possession of the entire stock, the fact that other levies were subsequently made by him on the other portions of the same stock did not affect the right of action of the owners for the wrongful possession first taken, which was never surrendered. Where he has stated that he will assume all responsibility, a right of action for conversion arises in favor of the owners.[77]

Where a writ of attachment is issued to a county other than the one in which the action was brought, and the officer executes it as provided by law, he is not liable in damages because the land was, after the levy, sold by an owner to an innocent purchaser, whereby plaintiff lost his security.[78]

An officer who has levied a wrongful attachment on a stock of merchandise, and excluded the owner from the store, is responsible for whatever articles he allows others to take therefrom, though he has not levied on them, and they be taken under process against another person.[79]

[74] Frankhouser v. Cannon, 32 P. 379, 50 Kan. 621.
[75] Meek v. Tilghman, 55 Okl. 208, 154 P. 1190.
[76] Jordan v. Neer, 125 P. 1117, 34 Okl. 400.
[77] Burdge v. Kelchner, 72 P. 232, 66 Kan. 642.
[78] Mount v. Trammel (Okl.) 175 P. 232, citing Rev. Laws 1910, § 4819.
[79] Simpson v. Voss, 1 P. 601, 31 Kan. 227.

An officer who wrongfully levies attachment on and sells the separate property of a wife in an action against her husband is guilty of conversion and liable in damages.[80]

A writ of attachment directed against the former owner of certain grain afforded no justification to the sheriff for its seizure in the hands of a subsequent purchaser.[81]

A sheriff, being in possession of a stock of goods by virtue of a levy made in pursuance of writs of attachment in his hands, is not responsible to a subsequent chattel mortgagee for conversion, when a receiver, duly appointed by the court from which the orders of attachment issued, takes exclusive control and possession of the goods, sells the same, and receives the proceeds.[82]

The fact that a small amount was due from the mortgagor to the holder of a prior mortgage, who was in possession of the property, did not affect the right of a subsequent mortgagee to recover for a conversion of the property by a sheriff, under a writ of attachment.[83]

§ 172. Indemnity bonds

An execution creditor, who has indemnified the sheriff, must give instructions when asked for, and when he fails to give such instructions the sheriff may proceed according to his best judgment, and the indemnitor will be liable for damage sustained by the sheriff.[84]

It is a defense to an action on an indemnity bond given an officer by an attachment creditor that through gross laches the officer failed to notify the creditor of a suit by a third person to recover the goods attached, and permitted such person to take judgment by default, pursuant to an agreement between the two that the officer should recover the amount of the judgment from the creditor.[85]

The obligee in an indemnity bond conditioned to save him harmless from any damages cannot sue thereon until he has, by the payment of the judgment against him, been damaged, but payment

[80] Sale v. Shipp, 58 Okl. 598, 160 P. 502.
[81] Cook v. Higgins, 71 P. 259, 66 Kan. 762.
[82] Smith-Frazer Boot & Shoe Co. v. Ware, 28 P. 159, 47 Kan. 483.
[83] Johnson v. Anderson, 57 P. 513, 60 Kan. 578.
[84] Ireland v. Linn County Bank, 103 Kan. 618, 176 P. 103, 2 A. L. R. 184.
[85] Armour Packing Co. v. Orrick, 46 P. 573, 4 Okl. 661.

may be made in the note of the obligee, if accepted as actual payment and satisfaction of the judgment.[86]

A sheriff, indemnified for enforcement of execution, can recover attorney's fees in protecting his interests in the personalty levied on, and in resisting actions against him, and his mileage fees and fees paid for publication of notice of sale and expenses in caring for property.[87]

When final judgment was rendered against the sheriff for conversion in making a wrongful levy, the plaintiff's right of action accrued against the surety on a bond taken by the sheriff to indemnify him in making the levy.[88]

Division IV.—Attorneys

§ 173. Who permitted to practice—Examinations for admission

"No person shall be permitted to practice as an attorney and counselor at law, or to commence, conduct, or defend any action or proceeding, in which he is not a party concerned, either by using or subscribing his own name, or the name of any other person, unless he has been previously admitted to the bar by order of the Supreme Court, and the court shall fix the time when examinations shall take place, which may be either in term or vacation, and shall fix the examination and admission fees, and prescribe and publish rules to govern such examinations." [89]

§ 174. —— Applicants to conform to rules—Fees for admission

"Persons making application for license to practice law in the courts of this state shall conform to the rules established by the Supreme Court and those applicants who are required to be examined shall at the time of making application for license to practice law pay to the clerk of the Supreme Court, in addition to any

[86] Gardner v. Cooper, 58 P. 230, 9 Kan. App. 587, judgment affirmed 60 P. 540, 9 Kan. App. 587.

[87] Ireland v. Linn County Bank, 103 Kan. 618, 176 P. 103, 2 A. L. R. 184.

[88] Gardner v. Cooper, 60 P. 540, 9 Kan. App. 587, affirming judgment 58 P. 230, 9 Kan. App. 587.

[89] Rev. Laws 1910, § 234.

Unqualified persons are prohibited from practicing law. Sess. Laws 1919, p. 248, §§ 1–3.

An attorney admitted to practice in the Indian Territory United States Court was eligible to admission to practice in the Oklahoma Supreme Court. Martindale v. Shaha, 51 Okl. 670, 151 P. 1019.

fee that may be required by law for the issuance of the license, the sum of twelve dollars. All other applicants shall pay to the clerk of the Supreme Court at the time of filing their application in addition to the fee that is or may be required by law, for the issuance of license, the sum of five dollars." [90]

§ 175. —— Examination—Commission

"When a person applies to said court for admission to the bar, he shall be examined by the court, or by a commission appointed by the court, and under such rules and regulations as the court may provide, touching his fitness and qualifications; and if, on such examination, the court is satisfied that he is of good moral character, and has a competent knowledge of the law, and sufficient general learning, an oath of office shall be administered to him, and an order shall be made on the journal that the applicant be admitted to practice as an attorney and counselor at law in all courts of record of this state: Provided, that said court may appoint, to serve for one or more years, a commission composed of not less than five persons learned in the law to assist in such examination. The clerk of the Supreme Court shall be ex officio secretary of any commission appointed by the Supreme Court to assist in the examination of applicants." [91]

§ 176. —— Qualifications

"No person shall be admitted to such examination unless he is twenty-one years of age, and is a citizen of the United States, or has declared his intention of becoming a citizen thereof; nor until he has produced from some attorney at law a certificate setting forth that the applicant is of good moral character, and that he has regularly and attentively studied law during the period of two years previous to his application, and that he believes him to be a person of sufficient legal knowledge and ability to discharge the duties of an attorney and counselor at law." [92]

§ 177. —— Persons not permitted to practice

"No person shall practice as an attorney and counselor at law in any court of this state who is not a citizen of the United States, or

[90] Rev. Laws 1910, § 235.
[91] Rev. Laws 1910, § 237.
[92] Rev. Laws 1910, § 239.

who holds a commission as judge of any court of record, or who is a sheriff, coroner, or deputy sheriff; nor shall the clerk of the Supreme Court, or the clerk of the district court, or probate court, or the deputy of either, practice in the particular court of which he is clerk or deputy clerk; but nothing herein contained shall prevent any judge of any of the courts of this state from finishing any business by him undertaken in the district, circuit or Supreme Court of the United States, prior to his election or appointment as judge; and an alien who has declared his intention to become a citizen of the United States may practice as if he were a citizen." [93]

§ 178. —— Attorneys from other states—How admitted

"Any person residing in the state or coming into the state for the purpose of making it his permanent residence, upon producing satisfactory evidence that he has been regularly admitted as an attorney and counselor at law in another state or territory, where an examination in the highest appellate court of the state is required, may be admitted to practice law in this state under such rules, regulations and conditions as the Supreme Court may make and publish, upon producing satisfactory evidence that he is a person of good moral character, and that he has never been disbarred." [94]

§ 179. —— Oath upon admission

"Upon being permitted to practice as attorneys and counselors at law, they shall, in open court, take the following oath: 'You do solemnly swear that you will support, protect and defend the Constitution of the United States, and the Constitution of the state of Oklahoma; that you will do no falsehood or consent that any be done in court, and if you know of any you will give knowledge thereof to the judges of the court, or some one of them, that it may be reformed; you will not wittingly, willingly or knowingly promote, sue, or procure to be sued, any false or unlawful suit, or give aid or consent to the same; you will delay no man for lucre or malice, but will act in the office of attorney in this court according to your best learning and discretion, with all good fidelity as well to the court as to your client. So help you God.'" [95]

[93] Rev. Laws 1910, § 240.
[94] Rev. Laws 1910, § 241.
[95] Rev. Laws 1910, § 242.

§ 180. —— Foreign attorneys.

"Any practicing attorney of another state or territory, having professional business in the courts of this state, may be admitted to practice therein upon taking the oath aforesaid." [96]

§ 181. Duties

"It is the duty of an attorney and counselor:

"First. To maintain, while in the presence of the courts of justice, or in the presence of judicial officers engaged in the discharge of judicial duties, the respect due to the said courts and judicial officers, and at all times to obey all lawful orders and writs of the court.

"Second. To counsel and maintain no actions, proceedings or defenses except those which appear to him legal and just, except the defense of a person charged with a public offense.

"Third. To employ for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statements of facts or law.

"Fourth. To maintain inviolate the confidence, and, at any peril to himself, to preserve the secrets of his client.

"Fifth. To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which he is charged.

"Sixth. Not to encourage either the commencement or continuance of an action or proceeding from any motive of passion or interest.

"Seventh. Never to reject for any consideration personal to himself the cause of the defenseless or the oppressed." [97]

§ 182. Power, duty, and liability

The court should treat all persons having business therein with absolute fairness, and such persons, and especially attorneys, should treat the court in the same manner, and unfairness of attorneys, and any attempt to impose upon the confidence of the court, cannot be too strongly condemned. The proper administration of jus-

[96] Rev. Laws 1910, § 243.
[97] Rev. Laws 1910, § 244.

tice requires that attorneys should be fair and honorable with opposing counsel, the court, and their clients.[98]

Attorneys are not liable, if their acts are in good faith and pertinent to the matter in question.[99]

An attorney undertaking to conduct a case impliedly agrees to carry it to its termination, and cannot abandon it without cause or reasonable notice.[1]

Ratification of the act of an attorney is equivalent to an original grant of authority.[2]

§ 183. —— Implied authority—Tender—Compromise—Notice

An attorney, employed to institute and prosecute a suit, has no implied authority to receive a tender,[3] or to make a compromise or settlement.[4]

[98] Caples v. State, 104 P. 493, 3 Okl. Cr. 72, 26 L. R. A. (N. S.) 1033.

Attorneys must treat each other and the trial courts with fairness and good faith. Simmons v. State, 114 P. 752, 4 Okl. Cr. 490, denying rehearing 112 P. 35, 4 Okl. Cr. 489.

While it is an attorney's duty to do everything that is fair and legal to protect the substantial rights of his client, it is also his duty to the court to try the case on its actual merits, and not to present questions, not jurisdictional, which are purely technical, and do not involve the actual merits. Ostendorf v. State, 128 P. 143, 8 Okl. Cr. 360.

Defendant, an attorney employed to protest confirmation of a guardian's sale of client's land, who, after his protest, failed, and on information to and approval by client raised the bid and purchased land and, after offering it to client for amount of bid, sold it at a small profit, held, on the evidence, to have acted in utmost good faith and fairness to client. Watts v. Jackson, 75 Okl. 123, 182 P. 508.

[99] Waugh v. Dibbens, 61 Okl. 221, 160 P. 589, L. R. A. 1917B, 360.

[1] McLaughlin v. Nettleton, 47 Okl. 407, 148 P. 987. He is authorized by his employment to do in behalf of his client all acts necessary or incidental to prosecution and management of suit which affect the remedy as distinguished from the cause of action. He has the right to waive a jury and consent to try his client's case on a date before the action regularly stands for trial. Neil v. Union Nat. Bank of Chandler (Okl.) 178 P. 659.

On an issue as to the sufficiency of a notice to vacate certain railroad depot grounds, signed in the name of the railroad company by F. and A., "its attorneys," the word "attorneys" should be construed to mean attorneys at law. Nolan v. St. Louis & S. F. R. Co., 91 P. 1128, 19 Okl. 51. A duly authorized attorney, after employment, may give any notice affecting the substantial rights of his client that the client might himself have given, and those affected by the notice must take notice thereof. Id.

[2] St. Louis & S. F. R. Co. v. Leger Mill Co., 53 Okl. 127, 155 P. 599.

[3] Massachusetts Bonding & Ins. Co. v. Vance (Okl.) 180 P. 693.

[4] Massachusetts Bonding & Ins. Co. v. Vance (Okl.) 180 P. 693; First

Where an attorney compromises a pending action and his authority to do so is put in issue, the burden is on the party asserting the compromise to show authority therefor or ratification thereof.[5] But in an action to enforce a compromise and settlement of a damage case, it will not be presumed that the attorney making the settlement for defendant was without lawful authority, and slight evidence will be deemed sufficient to take the case to the jury on that question.[6]

Prior to judgment, an attorney has no interest in the cause of action enabling him to prevent any bona fide settlement by the client.[7]

§ 184. —— May receive money for client

"An attorney and counselor has power to receive money claimed by his client in an action or proceeding during the pendency thereof, or afterwards, unless he has been previously discharged by his client, and, upon payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment." [8]

§ 185. —— Proof of authority to appear

"The court may, on motion of either party, and on the showing of reasonable grounds therefor, require the attorney for the adverse party, or for any one of the several adverse parties, to produce or prove by his oath, or otherwise, the authority under which he appears, and, until he does so, may stay proceedings by him on behalf of the parties for whom he assumes to appear." [9]

§ 186. —— Purchasing property

An attorney is not under an absolute disability to purchase his client's property; but where he does purchase, he assumes burden of proving his utmost good faith, his payment of an adequate consideration, and that he fully informed client of all material facts and

State Bank of Indiahoma v. Carr (Okl.) 180 P. 856; Turner v. Fleming, 130 P. 551, 37 Okl. 75, 45 L. R. A. (N. S.) 265, Ann. Cas. 1915B, 831.

[5] Scott v. Moore, 52 Okl. 200, 152 P. 823; Hamberger v. White, 54 Okl. 736, 154 P. 576.

[6] St. Louis & S. F. R. Co. v. Leger Mill Co., 53 Okl. 127, 155 P. 599.

[7] Wells Fargo & Co. v. Moore, 31 Okl. 135, 120 P. 612.

[8] Rev. Laws 1910, § 245.

[9] Rev. Laws 1910, § 246.

gave the same disinterested advice he would have given on a sale to a stranger.[10]

Where an attorney buys land from a vendee at foreclosure sale, the fact that he had been an attorney for the mortgagor does not prevent the attorney from purchasing the land in his own right, in the absence of fraud, and where he had no duty to perform inconsistent with the purchase.[11]

Where the sale of a judgment to an attorney is beneficial to his client, and for an adequate price, and made pursuant to the desire of the client, the attorney is not, by reason of his relation to the judgment creditor, precluded from relief under the judgment.[12]

§ 187. Lien for services—Extent—Notice

"From the commencement of an action, or from the filing of an answer containing a counterclaim, the attorney who represents the party in whose behalf such pleading is filed shall, to the extent hereinafter specified, have a lien upon his client's cause of action or counterclaim, and same shall attach to any verdict, report, decision, finding or judgment in his client's favor, and the proceeds thereof, wherever found, shall be subject to such lien, and no settlement between the parties without the approval of the attorney shall affect or destroy such lien, provided such attorney serves notice upon the defendant or defendants, or proposed defendant or defendants, in which he shall set forth the nature of the lien he claims and the extent thereof; and said lien shall take effect from and after the service of such notice, but such notice shall not be necessary provided such attorney has filed such pleading in a court of record, and indorsed thereon his name, together with the words 'Lien claimed.'" [13]

An attorney has a lien only upon his client's affirmative cause of action which cannot be extended to services merely protecting an existing right or title in client's property.[14]

Where an attorney's contract to bring action for land in the adverse possession of another gives him a percentage of the land in

[10] Watts v. Jackson, 75 Okl. 123, 182 P. 508.
[11] Harrison v. Murphey, 39 Okl. 548, 49 L. R. A. (N. S.) 1059, 135 P. 1137.
[12] Holmes v. Culver, 133 P. 164, 89 Kan. 698.
[13] Rev. Laws 1910, § 247.
[14] Elliott v. Orton (Okl.) 171 P. 1110, L. R. A. 1918E, 103.

event of recovery or compromise, such lien is prior to an oil and gas lease executed by the client pending suit; and, where on compromise part of land is conveyed to the attorney to satisfy lien, it is not subject to the lease.[15]

§ 188. Fees

"It shall be lawful for an attorney to contract for a percentage or portion of the proceeds of a client's cause of action or claim not to exceed fifty per centum of the net amount of such judgment as may be recovered, or such compromise as may be made, whether the same arises ex contractu or ex delicto, and no compromise or settlement entered into by a client without such attorney's consent shall affect or abrogate the lien provided for in this chapter." [16]

A contract for attorney's fees and note and mortgage therefor, after inception of litigation, will not be set aside, in absence of allegation or proof of fraud, mistake, or imposition.[17]

A valid covenant in an attorney's contract, for contingent fees, based on a legal consideration, is enforceable, though a separable covenant for the same consideration is void as against public policy.[18]

In an action to recover attorney's fees under contract making the amount contingent on success, counsel's skill, diligence, and legal knowledge should be measured largely by the result, and not by number or length of pleadings, number of appearances in court, or time consumed in oral argument.[19] A client, who has contracted to pay an attorney a percentage of proceeds of cause of action, cannot compromise his cause of action, so as to affect the attorney's fee or abrogate his lien.[20]

Where a defense in an action was based on the alleged want of authority of plaintiff's attorney to give a certain notice, the burden was on defendant to prove such want of authority.[21] Where a

[15] Gust v. Van Court (Okl.) 178 P. 683.
[16] Rev. Laws 1910, c. 5, § 248.
[17] Spaulding v. Beidleman, 61 Okl. 183, 160 P. 1120.
[18] Allen v. Shepherd (Okl.) 169 P. 1115; Culver v. Diamond (Okl.) 167 P. 223, 64 Okl. 271.
[19] Cornelius v. Smith (Okl.) 175 P. 754, 9 A. L. R. 233.
[20] Allen v. Shepherd (Okl.) 169 P. 1115; Herman Const. Co. v. Wood, 128 P. 309, 35 Okl. 103.
[21] Nolan v. St. Louis & S. F. R. Co., 91 P. 1128, 19 Okl. 51.

client contracts to pay a contingent fee, and compromised with adverse party, without attorney's consent, the attorney might sue adverse party for the amount due under the contract. In such a case he must show client's meritorious cause of action, and what client would have been entitled to receive.[22]

§ 189. —— Enforcement—Compromise without notice

"Should the party to any action or proposed action, whose interest is adverse to the client contracting with an attorney settle or compromise the cause of action or claim wherein is involved any lien, as mentioned in the preceding section thereof, such adverse party shall thereupon become liable to such attorney for the fee due him or to become due him under his contract of employment. After judgment in any court of record, the attorney's lien, provided for herein may also be effective against the judgment debtor, by entering same in the judgment docket opposite the entry of the judgment, and such attorney may enforce any lien provided for by this act in any court of competent jurisdiction by action filed within one year after he becomes aware of such compromise, or judgment may be rendered on his motion in the case in the court in which the suit was brought." [23]

Under a former statute it was held that, where an attorney files a lien claim and the case is compromised by his client without his consent, he may recover his fee from the party settling with his client if his client should have prevailed, but not otherwise.[24] In an ac-

[22] Allen v. Shepherd (Okl.) 169 P. 1115.

[23] Sess. Laws 1919, c. 22, § 1, amending Rev. Laws 1910, § 249.

Where parties to a judgment in trial court settle their controversy after appeal to Supreme Court, the appeal will be dismissed, notwithstanding the attorneys for defendants have a contract for a contingent fee and the settlement was without their consent. Ingram v. Johnson (Okl.) 176 P. 241.

Where attorney was employed to bring suit, and it was compromised without notice to him, and he sues the adverse party for compensation for services, he need not show merits of his client's cause, but merely employment, a suit, compliance with statute, a compromise by adverse litigant without notice, and value of services. Oklahoma Coal Co. v. Hays (Okl.) 176 P. 931. In attorney's suit to recover a fee against an adverse litigant, the attorney's client, whose action has been compromised and settled, is not a necessary party. Id.

Where the client with whom an attorney has contracted pursuant to Laws 1909, c. 4, compromises the case without the attorney's consent, the attorney

[24] Crump v. Guyer, 60 Okl. 222, 157 P. 321, 9 A. L. R. 331.

tion to recover an attorney fee from an adverse litigant, plaintiff must show that the litigation was compromised without notice or opportunity to him to be present and establish his client's rights.[25]

Where an attorney under the terms of his general employment debars himself from employment by others whose interests are antagonistic to those of his client, such service is a proper item of charge in a suit for services rendered under the general employment.[26]

An attorney has a general possessory or retaining lien on property or money of his client in his hands for his fees, etc., which lien is not lost while the money is still under control of attorney's agent.[27]

That an Indian Territory attorney eligible to admission to practice in the Oklahoma Supreme Court had not been enrolled when he contracted with a client, did not preclude him from recovering from his associate counsel his share of a fee collected by such counsel.[28]

§ 190. —— Amount which may be recovered

"Should the amount of the attorney's fees be agreed upon in the contract of employment, then such attorney's lien and cause of

may recover as his fee from the adverse litigant the amount he would have received on final judgment for his client. Gulf, C. & S. F. Ry. Co. v. Williams, 49 Okl. 126, 152 P. 395. In an attorney's action to recover a percentage fee from the adverse litigant with whom his client has compromised, the attorney may establish the merits of the client's cause of action. Id. Where the plaintiff attorney had contracted with his client for 50 per cent. of the amount recovered, the measure of his recovery from the adverse litigant was 50 per cent. of what would have been recovered by suit, with interest, and not merely that which would constitute "a reasonable attorney's fee." Id.

[25] Whitehead v. Spriggs, 58 Okl. 42, 158 P. 439.

Where a contract for contingent fee has been made and a compromise had between the client and the adverse litigant, without consent of the attorney, the latter may sue the adverse litigant for the amount due him under his contract, and show the amount his client would have been entitled to if the suit had been prosecuted to judgment. Herman Const. Co. v. Wood, 128 P. 309, 35 Okl. 103.

[26] Mellon v. Fulton, 98 P. 911, 22 Okl. 636, 19 L. R. A. (N. S.) 960.

In an action by an attorney to recover against defendant for collusive settlement with a client of plaintiff to defraud him of his fees, evidence held insufficient to establish the charge of fraud with the certainty required. Wells Fargo & Co. v. Moore, 31 Okl. 135, 120 P. 612.

[27] American Nat. Bank of Stigler v. Funk (Okl.) 172 P. 1078, L. R. A. 1918F, 1137.

[28] Martindale v. Shaha, 51 Okl. 670, 151 P. 1019.

action against such adverse party shall be for the amount or portion of the property so agreed upon. If the fee be not fixed by contract the lien and cause of action, as aforesaid, shall be for a reasonable amount for not only the services actually rendered by such attorney, but for a sum, which it might be reasonably supposed, would have been earned by him, had he been permitted to complete his contract, and been successful in the action, and such attorney in order to recover need not establish that his client, if the case had gone to trial, would have been successful in the action, but the fact of settlement shall be sufficient without other proof to establish that the party making the settlement was liable in the action. Should the contract be for a contingent fee and specify the amount for which action is to be filed, then the lien and cause of action, as aforesaid shall be for the amount contracted for if fixed at a definite sum of money or for the percentage of the amount or property sued for as mentioned in said contract where the fee is fixed on a percentage basis, not exceeding thirty-three and one-third per cent. of the amount sued on where the settlement is before a verdict or judgment and if made after verdict or judgment then the full contract price." [29]

A sum certain provided for in a mortgage as an attorney's fee will be deemed reasonable, unless extravagantly large or extortionate.[30]

Where an attorney's services are performed under entire contract which has not been completely performed, he may sue upon a quantum meruit and recover the reasonable value of the services rendered, subject to set-off for breach of contract.[31]

§ 191. May not become surety in action in which employed

"Licensed attorneys of this state are prohibited from signing any bonds as surety in any civil or criminal action in which they may be employed as counselors, pending or about to be commenced in any of the courts of this state, or before any justice of

[29] Sess. Laws 1919, c. 22, § 2.

[30] A provision for a fee of $300 on foreclosure of a mortgage for $3,000 held not excessive as a matter of law. Gourley v. Williams, 46 Okl. 629, 149 P. 229.

[31] Hamilton v. Blakeney (Okl.) 165 P. 141.

the peace. All such bonds shall be absolutely void, and no penalty can be recovered of the attorney signing the same." [32]

§ 192. Lien—Release by giving bond

"Any person interested may release said lien by executing a bond in the sum double the amount claimed, or in such sum as may be fixed by a judge of the court in which the action or judgment is or has been pending, payable to the attorney, with security to be approved by the clerk of the court, conditioned to pay the amount finally due the attorney for his services, which amount may be ascertained by suit on the bond." [33]

§ 193. Suspension of license—Disbarment

"The Supreme Court may revoke or suspend the license of an attorney or counselor at law, but not until a copy of the charges against him shall have been delivered to him by the clerk of the court in which the proceedings shall have been commenced and an opportunity shall have been given him to be heard in his defense." [34]

A lawyer must conduct himself with fidelity and stern integrity, and there is no place at the bar for the unscrupulous. Disbarment, meaning professional excommunication and death, should be resorted to only when it is apparent that the interest of the community, the integrity of courts, or the honor of the profession imperatively demand it.[35]

A disbarment proceeding is a civil proceeding.[36] It is an "action," as that word is employed in its broadest sense of including all of the various proceedings ordinarily allowed in courts of justice.[37]

Disbarment is not a criminal or punitive proceeding, but the direct question therein is whether the respondent's character and

[32] Rev. Laws 1910, § 256.
An appeal bond signed by a licensed attorney employed in the trial is void. Schaffer v. Troutwein, 129 P. 696, 36 Okl. 653.
[33] Rev. Laws 1910, § 250.
[34] Rev. Laws 1910, § 251.
[35] In re Sitton (Okl.) 177 P. 555.
[36] In re Biggers, 104 P. 1083, 24 Okl. 842, 25 L. R. A. (N. S.) 622; Disbarment of Connell, 79 Okl. 212, 192 P. 564.
[37] In re Wilcox, 135 P. 995, 90 Kan. 646.

conduct are such that the Supreme Court should protect the public and courts of justice against him.[38]

§ 194. —— Causes

"The following are sufficient causes for suspension or revocation:

"First. When he has been convicted of a felony under the statutes of Oklahoma, or a misdemeanor involving moral turpitude, in either of which cases the record of conviction is conclusive evidence.

"Second. When he is guilty of a willful disobedience or violation of any order of the court requiring him to do or forbear any act connected with or in the line of his profession.

"Third. For the willful violation of any of the duties of an attorney or counselor." [39]

[38] In re Sitton (Okl.) 177 P. 555.

[39] Rev. Laws 1910, § 252.

An attorney's willful violation of any of his duties is sufficient ground for disbarment. In re Warren, 49 Okl. 87, 151 P. 619.

A county attorney accepting a bribe not to prosecute may be disbarred. In re Simpson, 79 Okl. 305, 192 P. 1097. Court may disbar for official misconduct. In re Simpson, 79 Okl. 305, 192 P. 1097.

Attorney's conviction of felony is ground for revocation of his license to practice law in the state. In re Horine, 64 Okl. 315, 167 P. 1148. Attorney's conviction of misdemeanor involving moral turpitude under statutes of Oklahoma is ground for revocation of his license to practice law in state. In re Williams, 64 Okl. 316, 167 P. 1149. "Moral turpitude" is anything contrary to justice, honesty, modesty, or good morals. Id.

The printing and publication of a pamphlet falsely and maliciously attacking the integrity of the courts and the judges thereof, designed to willfully, purposely, and maliciously misrepresent and bring them into disrepute, held ground for disbarment of an attorney. State Bar Commission v. Sullivan, 131 P. 703, 35 Okl. 745, L. R. A. 1915D, 1218.

In disbarment proceedings, respondent, who while a county attorney collected moneys on forfeited bonds, etc., and instead of turning it over, after deducting his commission, withheld it on a claim of county's indebtedness to him, exposed himself to charge of professional misconduct subject to reprimand. In re Sitton (Okl.) 177 P. 555.

An attorney who collected the money belonging to a client and failed to account for it, giving no excuse, is guilty of a breach of duty warranting his disbarment. In re Warren, 49 Okl. 87, 151 P. 619.

Upon referee's finding, supported by evidence, that attorney at law was convicted of embezzlement, he will be disbarred. In re Horine, 64 Okl. 315, 167 P. 1148.

Where evidence in record fully supported referee's findings of fact and conclusions of law that respondent had willfully violated his duties as an

The Supreme Court is not limited in its disciplinary power over attorneys to the grounds and remedies indicated by statute, but the statutory provisions are merely cumulative.[40]

While an attorney cannot be disbarred for filing a pleading, a petition with pamphlet attached which falsely and maliciously attacks the courts and judges may be considered as evidence of the attorney's unfitness to practice law.[41]

attorney and counselor at law, and was guilty of unethical and unprofessional conduct, for which his license to practice law should be revoked, the report would be approved, and the license revoked. State v. Curd, 75 Okl. 15, 181 P. 484.

Evidence in support of count of information or petition showing that respondent was attorney for a third party, and appeared in court as attorney for an Indian, and procured orders for benefit of third party, who had purchased from the Indian soon after he became of age all his claims against his former guardian at a price seeming to be inadequate, held not sufficient to disbar. In re Huddleston, 75 Okl. 48, 181 P. 711.

A member of a firm of attorneys who received a claim for collection, and who, in the absence of his partner, collected it and deposited it to his own credit and checked it out for his personal use, would be suspended for six months. State v. Breslin (Okl.) 169 P. 897. A member of a firm of attorneys receiving a claim for collection who was absent when his partner collected it and misappropriated the proceeds, and who upon knowledge thereof forwarded the amount in settlement of the claim, was not subject to disbarment or suspension. Id.

Schedule to the Constitution, § 33 (Bunn's Ed. § 482), providing that all attorneys licensed to practice in any court of Oklahoma Territory, or in the United States courts for Indian Territory, or in any court of the Five Civilized Tribes, shall be eligible to practice in any court of the state without examination, does not preclude an inquiry by the Supreme Court into any act or conduct of an attorney preceding the adoption of the Constitution and his disbarment therefor. In re Mosher, 102 P. 705, 24 Okl. 61, 24 L. R. A. (N. S.) 530, 20 Ann. Cas. 209.

A complaint alleging that an attorney who had been disbarred in Indiana practiced a fraud upon the court by securing his admission to practice here on a certificate issued by an Indiana court, prior to judgment disbarring him, states facts sufficient to disbar an attorney. Dean v. Stone, 35 P. 578, 2 Okl. 13.

One who sought admission to practice, and had himself enrolled without disclosing previous disbarment in another jurisdiction, was guilty of such a fraud on the court as required disbarment. In re Mosher, 102 P. 705, 24 Okl. 61, 24 L. R. A. (N. S.) 530, 20 Ann. Cas. 209.

[40] State Bar Commission v. Sullivan, 131 P. 703, 35 Okl. 745, L. R. A. 1915D, 1218; State Bar Commission v. Sullivan, 131 P. 703, 35 Okl. 745, L. R. A. 1915D, 1218.

[41] State Bar Commission v. Sullivan, 131 P. 703, 35 Okl. 745, L. R. A. 1915D, 1218.

§ 195. —— Defenses—Limitations

An attorney is exonerated from charges of unprofessional conduct, in applying for a continuance because of absence of material witnesses, who were actually present, where, though they were present, he did not know it and presented the application in good faith believing they were in fact absent.[42]

In action by an administratrix of attorney to recover on his contract for services in advising client in securing location of a depot by order of the state corporation commission, the fact that plaintiff, to have the depot so located, had to pay part of purchase price of the lot was no defense.[43]

In a proceeding for disbarment upon charges of the publication of a pamphlet disrespectful to the court, the statute of limitations is not available as a defense, especially where the pamphlet remains in circulation until a time within what would be the limitation period if the statute of limitations be construed to apply.[44]

§ 196. —— Proceedings—How commenced

"The proceedings to suspend or remove an attorney may be commenced by the direction of the court or on motion of any individual. In the former case, the court must direct some attorney to draw up the accusation; in the latter case, the accusation must be drawn up and sworn to by the person making it." [45]

The sufficiency of the verification of the charges in disbarment proceedings must be determined by an inspection of the verification, and the evidence of affiant cannot be received to show that he had no personal knowledge as to the charges. No verification of the charges is necessary in disbarment proceedings brought by the state bar commission by order of the Supreme Court.[46]

A defendant in a disbarment proceeding is not entitled to the 20 days' time allowed to answer an ordinary summons, but may be cited to appear within any time that gives him a reasonable opportunity to be heard.[47]

[42] In re Champion, 103 P. 600, 24 Okl. 154.

[43] Campbell v. House (Okl.) 176 P. 913.

[44] State Bar Commission v. Sullivan, 131 P. 703, 35 Okl. 745, L. R. A. 1915D, 1218.

[45] Rev. Laws 1910, § 253.

[46] State Bar Commission v. Sullivan, 131 P. 703, 35 Okl. 745, L. R. A. 1915D, 1218.

[47] In re Brown, 39 P. 469, 2 Okl. 590.

§ 197. —— Trial—Judgment

"To the accusation he may plead or demur, and the issues joined thereon shall in all cases be tried by the court, all the evidence being reduced to writing, filed and preserved." [48]

"If the accused plead guilty or fail to answer, the court shall proceed to render such judgment as the case requires." [49]

In a disbarment proceeding the attorney is presumed to be innocent of the charges preferred, and to have performed his duty as an officer of the court in accordance with his oath.[50] The evidence in support of the charges must satisfy the court to a reasonable certainty that the charges are true.[51]

A referee in a disbarment proceeding is an officer of the court, and the court has full authority to supervise and control his report by setting it aside, or confirming or modifying it as the facts and the law require.[52]

§ 198. Attorney and client in general

In construing a contract between a lawyer and one depending on him for advice, every presumption is rendered against the lawyer,[53] and he has the burden of showing fairness.[54] If he receives

[48] Rev. Laws 1910, § 254.

[49] Rev. Laws 1910, § 255.

[50] In re McNabb, 76 Okl. 253, 185 P. 431.

[51] Transcript of evidence in a disbarment proceeding based on charge that defendant employed to represent a guardian in a proceeding to sell lands of his minor children and wards received and kept purchase price without an order of court and made a conveyance to minors of certain land owned by him in lieu of money received, made false statements in preparing guardian's report, kept other moneys belonging to petitioner, and had been convicted of a misdemeanor involving moral turpitude, etc., examined, and held to support findings of referee which with his conclusions of law would be confirmed and the proceeding dismissed. In re McNabb, 76 Okl. 253, 185 P. 431. Guilt must be shown by more than a preponderance of the evidence. In re Simpson, 79 Okl. 305, 192 P. 1097.

[52] The report of a referee appointed to take evidence and report his findings of fact and conclusions of law in a disbarment proceeding is not conclusive as to either the findings or conclusions, but is accorded every reasonable presumption of correctness, and the burden is on party attacking it; but it is to be freely set aside by the court if found to be incorrect. In re McNabb, 76 Okl. 253, 185 P. 431.

[53] Barker v. Wiseman, 51 Okl. 645, 151 P. 1047.

[54] Board of Com'rs of Okfuskee County v. Hazlewood, 79 Okl. 185, 192 P. 217, 11 A. L. R. 709.

benefits under the contract, he is presumed to exert undue influence.[55]

An attorney's knowledge that the case in which he is employed has been set for trial, and that a judgment has been rendered therein, is imputed to the client, in the absence of fraud.[56]

Where the purchaser of land from purchasers at a guardian's sale intrusted approval of title to an attorney for loan companies, who performed such services without additional charge, the relation of attorney and client existed between such attorney and the purchaser, and he was bound by such notice as was acquired by the attorney in passing upon the title.[57]

An attorney is bound to act with entire good faith toward his client, and the latter is entitled to act on the attorney's information and advice as against information received from others. Where an attorney induced his client to assign her claim against the estate of her guardian to a business associate of the attorney for less than its value by false representations, that the client may have had information from other sources that her claim would be paid in full did not relieve the attorney from the consequences of his fraud, nor is the fact that in the client's original statement of the claim she asked that it be preferred notice to her that it would be paid in full, so as to relieve the attorney from the consequences of a letter fraudulently written thereafter to induce her to assign the claim for less than its value.[58]

The rights and remedies of attorneys existing before the Revised Laws of 1910 became effective were not affected by its adoption.[59]

[55] Hunter v. Battiest, 79 Okl. 248, 192 P. 575.

[56] Bigsby v. Eppstein, 39 Okl. 466, 135 P. 934.

Where attorney acting for indorsee of note had actual knowledge of infirmity, such knowledge will be imputed to indorsee. Lambert v. Smith, 53 Okl. 606, 157 P. 909.

[57] Pyeatt v. Estus (Okl.) 179 P. 42, 4 A. L. R. 1570.

[58] Mohr v. Sands, 44 Okl. 330, 133 P. 238.

[59] Culver v. Diamond, 64 Okl. 271, 167 P. 223; Allen v. Shepherd (Okl.) 169 P. 1115.

CHAPTER II

ARBITRATION, COMPROMISE, AND SETTLEMENT

Sections
199-200. Article I.—Arbitration.
201-202. Article II.—Compromise and settlement.

ARTICLE I

ARBITRATION

Sections
199. In general.
200. Forms.

§ 199. In general

"Arbitration" is the submission of some disputed matter to selected persons and the substitution of their decision for a judgment of court. It is recognized at common law, which, in the absence of statute, controls.[1] The settlement of disputes by arbitration is favored by the courts. Submission to arbitration may be by parol, where an oral agreement with respect to the matter submitted would be enforceable.[2]

An award, though made upon a mere common-law arbitration, is prima facie conclusive between the parties as to all matters submitted to the arbitrators; and such award is generally a bar to an action on the original claim, and this notwithstanding defendant has failed to comply with its requirements. Arbitrations ought to be encouraged, and an award of arbitrators, if unimpeached for fraud or mistake, should be sustained.[3]

An award has the same force as a judgment of a court of competent jurisdiction, and a controversy thus adjusted cannot be retried, unless the pleadings state facts sufficient to avoid the award.[4]

[1] Deal v. Thompson, 51 Okl. 256, 151 P. 856.

[2] Deal v. Thompson, 51 Okl. 256, 151 P. 856. Unless an agreement to submit to arbitration otherwise provides, the award may be by parol. Id.

[3] Groat v. Pracht, 3 P. 274, 31 Kan. 656. Controversies respecting any estate in lands may be made the subject of arbitration. Finley v. Funk, 12 P. 15, 35 Kan. 668.

[4] Scrivner v. McClelland (Okl.) 168 P. 415.

Where the plaintiff's claim is for money due for materials and labor, and the matters were submitted to arbitrators, who made an award that defend-

Where the parties agree that no oaths shall be administered to arbitrators, and that the testimony of witnesses unsworn shall be received, neither of them can make the omission to administer oaths a ground of objection to the award.[5]

Irregularities of arbitrators, to whom is submitted a controversy, and who act in good faith, which are not prejudicial to the complaining party, will not avoid an award.[6]

An award of arbitrators will not be set aside because the arbitrators have drawn incorrect conclusions from the facts before them.[7] But an award is not binding when it is the result of a misapprehension on their part of the language used in defining the matter submitted to their decision.[8]

Where an agreement is made to submit a controversy to two arbitrators, they to select a third, to act if they cannot agree, an award made by the third arbitrator and one of the others is binding.[9]

A party to an arbitration who, before an award, knew of the incompetency of one of the arbitrators, cannot set the award aside on that ground.[10]

An arbitrator is the agent of both parties concerned, and, where he proceeds as if he was the special agent of one, his decision is not binding, however honest his motives.[11]

ant give a check for a certain amount, surrender a certain note, and receipt two accounts, one against the plaintiff and one against his father-in-law, such award is a bar to an action on the original claim. Groat v. Pracht, 3 P. 274, 31 Kan. 656.

While the statutes of Oklahoma do not provide for arbitration, an arbitration may be had under the common law. Burke Grain Co. v. Stinchcomb (Okl.) 173 P. 204.

5 Russell v. Seery, 35 P. 812, 52 Kan. 736.

6 Anderson v. Burchett, 29 P. 315, 48 Kan. 153.

7 Russell v. Seery, 35 P. 812, 52 Kan. 736.

8 Swisher v. Dunn, 131 P. 571, 89 Kan. 412, 45 L. R. A. (N. S.) 810, rehearing denied 132 P. 832, 89 Kan. 787, 45 L. R. A. (N. S.) 813.

9 Fish v. Vermillion, 78 P. 811, 70 Kan. 348.

10 Anderson v. Burchett, 29 P. 315, 48 Kan. 153.

11 Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co., 172 P. 527, 102 Kan. 799.

§ 200. Forms

AGREEMENT TO SUBMIT TO ARBITRATION

(Caption)

Whereas, there are certain matters in dispute between A. B., C. D., and E. F.; and whereas it is the desire to settle said differences:

Now, therefore, witnesseth:

That we, A. B., C. D., and E. F. have agreed, and by these presents do hereby agree, to arbitrate all matters of dispute between us, and for that purpose have selected W. X. and Y. Z. as arbitrators, and we hereby agree to abide by the decision of said arbitrators;

And it is further agreed, that if said arbitrators cannot agree, they are to select a third person, whose decision shall be final in the premises, subject to all lawful and legal objections;

And it is further agreed, that the award of such arbitrators be made a rule of the district court of ——— county, Oklahoma; said arbitration to be according to the laws of the state of Oklahoma, and to be held at ———, in ——— county, Oklahoma, on the ——— day of ———, 19—, or at such time and place as said arbitrators shall agree upon.

Witness our hands, this ——— day of ———, 19—.[12]

(Signatures.)

OATH OF ARBITRATORS

(Caption)

We, W. X. and Y. Z., do solemnly swear that we will, to the best of our ability, hear and determine all matters of dispute between A. B., C. D., and E. F., and a true award make according to our best knowledge and ability.

(Signatures.)

Subscribed and sworn to before me this ——— day of ———, 19—.

My commission expires ———.

(Signature,)
Notary Public.[13]

[12] Weir v. West, 27 Kan. 650.
[13] Weir v. West, 27 Kan. 650.

AWARD OF ARBITRATORS

(Caption)

We, the undersigned, the duly appointed arbitrators of the matter in controversy between A. B., C. D., and E. F., as appears more fully in the agreement hereto attached, having taken the oath also hereto attached, do hereby certify that we notified each of said parties in writing of our first meeting, and that in pursuance to such notice we met at ———, in ——— county, Oklahoma, on the ——— day of ———, 19— (include and set out adjournments, if any), and proceeded to hear the allegations, evidence, proofs, and arguments of the said parties, and, after due deliberation, do hereby find, adjudge, award, determine, and order as follows: (Set forth conclusion of arbitrators.)

Witness our hands this ——— day of ———, 19—.

(Signatures.)

ARTICLE II

COMPROMISE AND SETTLEMENT

Sections

201. In general.
202. Construction.

§ 201. In general

A "compromise" is an agreement between two or more persons, who, to avoid a lawsuit, amicably settle their difficulties on such terms as they may agree upon.[14]

"Settlement" of a debt is the same as "payment." [15]

The law encourages the compromise and settlement of controversies in order to discourage litigation.[16]

A settlement agreement, impossible of performance, is not binding.[17]

Where the amount of the claim is in good faith disputed a com-

[14] City of Anadarko v. Argo, 128 P. 500, 35 Okl. 115.

[15] Roniger v. McIntosh, 137 P. 792, 91 Kan. 368.

[16] Pacific Mut. Life Ins. Co. of California v. Coley, 62 Okl. 161, 162 P. 713; St. Louis & S. F. R. Co. v. Chester, 138 P. 150, 41 Okl. 369.

[17] A stipulation for settlement conditioned on all parties in interest agreeing to its terms within 60 days, held void, where it was not binding on minor defendants and was impossible of performance. Whiteley v. Watson, 145 P. 568, 93 Kan. 671.

promise agreement by parties is sufficient consideration to uphold settlement, and bars further recovery,[18] though the demand was unfounded,[19] or one of the parties made an error in calculation,[20] or the amount agreed to be paid may be much less than is actually due,[21] and though the final issue be different from that anticipated and other than what the court would have decreed,[22] providing the settlement is not procured by fraud, misrepresentation,[23] or duress.[24]

[18] Jarecki Mfg. Co. v. Cimarron River Oil & Gas Co. (Okl.) 170 P. 252; Marsant v. Marsant, 57 P. 958, 60 Kan. 859; Finley v. Funk, 12 P. 15, 35 Kan. 668.

Acceptance of part of claim against county, which commissioners in good faith claimed to have been barred by limitations, in consideration of release in full, held to prevent recovery of remainder. Nolan v. Board of County Com'rs of Ellis County (Kan.) 168 P. 326.

Bona fide dispute between heir and school and church, whether the latter had acquired interest in property by will, constituted sufficient consideration for compromise in good faith. Shellberg v. McMahon, 157 P. 268, 98 Kan. 46.

Agreement to give a credit upon note, made in good faith without mistake, undue influence, or fraud, based on settlement of a disputed claim, is valid and enforceable. Hollister v. Smith, 62 Okl. 191, 162 P. 706.

A compromise of a disputed claim on sufficient consideration, with knowledge of the facts on which an alleged defense is based, is a surrender of such defense, when the adverse party has executed the terms of settlement on his part. Logsdon v. Hudson, 112 P. 118, 83 Kan. 500.

Where defendant, in settlement of existing liability, contracted to pay plaintiff $3,000 if well proposed to be drilled on land leased to defendant was a paying well, and sold the lease to a purchaser, who developed a paying well, defendant was liable to plaintiff for payment of $3,000. Gem Oil Co. v. Callendar (Okl.) 173 P. 820.

Where two parties in the settlement of a controversy agree on the amount due, and the debtor executes a note therefor, the compromise is binding upon the parties. Kiler v. Wohletz, 101 P. 474, 79 Kan. 716, L. R. A. 1915B, 11. Where there has been a valid agreement to compromise, it is not admissible to go back of the settlement to determine who was right in the original contention. Id.

[19] Lewis v. Gove County Telephone Co., 147 P. 1122, 95 Kan. 136, Ann. Cas. 1916B, 1035.

[20] Brooks v. Hall, 14 P. 236, 36 Kan. 697.

[21] Minor v. Fike, 93 P. 264, 77 Kan. 806.

Receipt of a sum less than that claimed will, where the claim is unliquidated or disputed, be treated as a satisfaction. Sherman v. Pacific Coast Pipe Co., 60 Okl. 103, 159 P. 333, L. R. A. 1917A, 716.

[22] Sango v. Parks, 44 Okl. 223, 143 P. 1158.

[23] The law favors compromise and settlement of disputes, and when parties without fraud enter into an agreement settling and adjusting a dispute,

[24] See note 24 on following page.

A defendant in an action without merit may compromise the litigation without making himself liable in any way to any third party.[25]

§ 202. Construction

A settlement agreement will be given a reasonable construction to carry out the intentions of the parties,[26] and the usual rules of evidence apply.[27]

neither is permitted afterward to deny it. Lewis v. Kimball, 173 P. 279, 103 Kan. 173. Agreement based on a good consideration, settling amount to which plaintiff was entitled for services in finding a purchaser for defendant's land, made without fraud or concealment, is binding, regardless of the merits of controversy. Id.

If there is a bona fide controversy, and a compromise thereof, such settlement, in the absence of fraud or mistake, is binding upon the parties thereto, as an original contract. Schmidt v. Demple, 52 P. 906, 7 Kan. App. 811.

A railroad employé who made a settlement under misrepresentations by the company's physicians as to the extent of his injuries held entitled to relief, whether they were innocently or intentionally false. Chicago, R. I. & P. Ry. Co. v. Rogers, 60 Okl. 249, 159 P. 1132.

In an action to set aside a settlement as obtained by fraud, it was found by the referee that the settlement should be set aside and opened as to three particular items, and that the rest should stand, and this finding was approved by the court, and there was evidence tending to support it. Held, that the findings as to the three particular items, and as to the balance of the settlement, not being contradictory, the district court was authorized to correct the particular wrong and leave the settlement otherwise undisturbed. Reid v. Beyle, 18 P. 614, 39 Kan. 559.

[24] The fact that a creditor insisted that a larger amount was due than the creditor admitted, and that he threatened to enforce his claim by a civil action, does not constitute duress. Kiler v. Wohletz, 101 P. 474, 79 Kan. 716, L. R. A. 1915B, 11. The fact that a creditor insisted that a larger amount was due, and that he threatened a civil suit, does not constitute fraud. Id.

[25] Avery v. Howell, 172 P. 995, 103 Kan. 31.

[26] A written contract, settling all items of indebtedness existing between parties thereto on the day it is signed, includes existing debts, but not those thereafter arising. Ryan v. Myers, 101 Kan. 261, 167 P. 1043.

An agreement between an officer and stockholder of a corporation and a purchaser of his stock that such officer is "to be given his salary including to day. If it is overdrawn he to pay back. On sale he is to have no claim on anything, credits, supplies or other assets of Co. & the differences are then considered adjusted," held, not an adjustment of the officer's salary, so as to

[27] In an action on a note given in consideration of a contract of settlement between joint owners of property, evidence as to matters settled by the agreement held properly excluded. Harn v. Hare, 48 Okl. 3, 151 P. 615.

preclude him from claiming the full salary due him. Keating v. Mutual Laundry Co., 133 P. 152, 90 Kan. 24.

Where the parties made a contract of settlement concerning their dispute about the title to certain land, and executed the same, and, to carry the same into effect, delivered their respective deeds for portions of the land, they were bound by such agreement of settlement, notwithstanding the deeds did not sufficiently describe the land to convey the legal title. Anderson v. Canter, 63 P. 285, 10 Kan. App. 167.

Plaintiff made a written offer to compromise his claim if paid within 10 days. Defendant's letter accepting the offer, and inclosing a check, did not reach plaintiff until twelve days thereafter. The plaintiff cashed the check, and retained the proceeds, but sent no receipt as requested, and later sued for a balance. Held, that, although time was of the essence of the proposition made, the plaintiff, by retaining the part payment, produced the same effect as if defendant's letter had been an original offer of compromise which the plaintiff accepted, and which was fully complied with by the payment of the stipulated amount. Hutchinson & S. R. Co. v. Wallace, 52 P. 458, 7 Kan. App. 612.

Defendant, in an action for damages for wrongfully withholding possession of land, conveyed his interest in the land to another, and entered into an agreement with plaintiffs pursuant to which he paid to them a sum of money in settlement of all claims for the detention of the land up to the time of the conveyance, and the suit was consequently dismissed. This agreement provided that it should not cover any claim against defendant's grantee for taking possession of the land, nor any right which plaintiff might have against such grantee. A contemporaneous agreement was entered into between plaintiffs, defendant, and defendant's grantee, which provided for the substitution of the grantee in lieu of defendant in the action which was then pending against defendant and in all subsequent proceedings relating thereto. Held, that the compromise between defendant and plaintiffs did not operate as a satisfaction of plaintiffs' claim against defendant's grantee, nor preclude the maintenance of an action by plaintiffs against defendant's grantee for damages for the wrongful withholding of the possession of the land from the date of the conveyance. Meriwether v. Howe, 82 P. 723, 72 Kan. 645.

Where, on a creditors' bill being brought to assert title to land conveyed to the debtor's wife, a settlement is made, and the action is dismissed on the debtor giving his note, the land conveyed to the wife cannot be attached in a subsequent action on the note. Lanphear v. Ketcham, 37 P. 119, 53 Kan. 799.

CHAPTER III

JURISDICTION

Sections
203–216. Article I.—Nature, scope, elements, and exercise.
217–247. Article II.—Original, concurrent, and appellate jurisdiction.

ARTICLE I

NATURE, SCOPE, ELEMENTS, AND EXERCISE

Sections
203. Jurisdiction defined.
204. Basis and elements.
205. Original jurisdiction.
206. Scope, extent, and place of exercise.
207. Territorial extent.
208. Where parties reside or may be found.
209. Jurisdiction of subject-matter.
210. Trusts.
211. Consent and waiver.
212. Ancillary jurisdiction.
213. Rule of comity.
214. Shown by record.
215. Determination of jurisdiction.
216. Objections.

§ 203. Jurisdiction defined

Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them, and if the law confers power to render a judgment or decree the court has jurisdiction.[1] It does not relate to rights of parties, but to the power of the court.[2]

[1] Welch v. Focht (Okl.) 171 P. 730, L. R. A. 1918D, 1163; National Surety Co. v. S. H. Hanson Builders' Supply Co., 64 Okl. 59, 165 P. 1136; Antene v. Jensen, 47 Okl. 352, 148 P. 727; Model Clothing Co. v. First Nat. Bank of Cushing, 61 Okl. 88, 160 P. 450. It is the power of courts and judicial officers to take cognizance of and determine the subject-matter in controversy between parties to a pending proceeding, and to exercise judicial power. Apache State Bank v. Voight, 61 Okl. 253, 161 P. 214.

Jurisdiction is the authority by which courts and judicial officers take cognizance of and decide cases, so that, if a court has jurisdiction of the persons to the action, and the cause is the kind of a cause triable in such court,

[2] Parmenter v. Ray, 58 Okl. 27, 158 P. 1183; Dickson v. Lowe (Okl.) 163 P. 523.

A court of competent jurisdiction is one having power and authority of law at time of acting to do the particular act.[3]

§ 204. Basis and elements

The jurisdiction of the several courts of this state and of the judges thereof is regulated by the Constitution and laws of the state.[4]

The elements of jurisdiction are a court created by law, authority to hear and determine causes, the power to render judgment, authority over parties and the thing adjudicated, and authority to decide the question involved.[5]

In the absence of seizure of property or debt of a nonresident defendant on which judgment is to operate, power to render judgment is lacking, and the fact that there is property within the jurisdiction does not give the court jurisdiction.[6]

§ 205. Original jurisdiction

The phrase "original jurisdiction" means the power to entertain cases in the first instance as distinguished from appellate jurisdiction, and does not mean exclusive jurisdiction. A court of original jurisdiction is one in which an action has its origin.[7]

§ 206. Scope, extent, and place of exercise

Where the court has jurisdiction over the persons to the action by legal service or voluntary appearance, and the cause is of a kind triable in such court, it has jurisdiction to render any rightful judgment therein.[8]

Courts possess inherent power to prevent any abuse of their process,[9] and to correct errors in their own proceedings.[10] The

it has jurisdiction of the subject of the action, and has the power to render any rightful judgment therein. Parker v. Lynch, 56 P. 1082, 7 Okl. 631; Bockfinger v. Foster, 62 P. 799, 10 Okl. 488, judgment affirmed 23 S. Ct. 836, 190 U. S. 116, 47 L. Ed. 975.

[3] Ex parte Adair, 115 P. 277, 5 Okl. Cr. 374; Ex parte Justus, 104 P. 933, 3 Okl. Cr. 111, 25 L. R. A. (N. S.) 483; In re Wilkins, 7 Okl. Cr. 422, 115 P. 1118.

[4] In re Jewett, 77 P. 567, 69 Kan. 830.

[5] Roth v. Union Nat. Bank of Bartlesville, 58 Okl. 604, 160 P. 505.

[6] Waldock v. Atkins, 60 Okl. 38, 158 P. 587.

[7] Burks v. Walker, 109 P. 544, 25 Okl. 353.

[8] Crutcher v. Block, 91 P. 895, 19 Okl. 246, 14 Ann. Cas. 1029.

[9] Patterson v. Imperial Window Glass Co., 137 P. 955, 91 Kan. 201.

[10] Todd v. Orr, 44 Okl. 459, 145 P. 393.

"district court" is a tribunal established to exercise definite judicial powers at a designated time and place. The district judge constitutes the court only when performing the functions of the same at the time and place fixed by law, and the district judge, as contradistinguished from the court, cannot determine motions to vacate judgments or orders.[11]

A judge cannot perform any judicial act while beyond the state.[12]

§ 207. —— Territorial extent

The jurisdiction of the several district courts and of the judges thereof in civil matters is confined to their respective districts.[13]

Not every action growing out of transactions concerning real property is local, and where the decree sought is to operate on the person, and not upon the real property, the location of the property indirectly affected is not material.[14]

A surety on a guardian's bond executed in Arkansas may, on his removal to Oklahoma, be sued here for breach of the bond.[15]

§ 208. Where parties reside or may be found

An action to set aside a conveyance for fraud may be brought in any jurisdiction where the guilty parties may be found, and the court will have authority, not only to declare the conveyance void, but to compel defendant to do the things necessary, according to the lex loci rei sitæ, which they could voluntarily do, to give effect to the decree.[16]

A city of another state which is operating a water plant in this state cannot be sued in this state for injuries sustained in that city through its negligence.[17]

[11] Eichoff v. Caldwell, 51 Okl. 217, 151 P. 860, L. R. A. 1917E, 359.

[12] Dunlap v. Rumph, 43 Okl. 491, 143 P. 329.

The parties to a proceeding in error cannot by agreement dispense with the necessity of the case-made being approved and signed by the judge while within the state. Dunlap v. Rumph, 143 P. 329, 43 Okl. 491.

[13] In re Jewett, 77 P. 567, 69 Kan. 830.

[14] Continental Gin Co. v. Arnold (Okl.) 167 P. 613, L. R. A. 1918B, 511.

Where a mere trespasser entered on land in Missouri, and removed sand therefrom to Kansas, where he converted it to his own use, the owner of the land could maintain an action in Kansas for the value of the sand, as such an action is transitory. McGonigle v. Atchison, 7 P. 550, 33 Kan. 726.

[15] Hays v. King, 44 Okl. 180, 143 P. 1142.

[16] Fuller v. Horner, 77 P. 88, 69 Kan. 467.

[17] Marshall v. Kansas City, 148 P. 637, 95 Kan. 548, L. R. A. 1915F, 1025.

That defendants, with one exception, are nonresidents, and no personal judgment can be rendered against them, does not deprive the court of jurisdiction, in an action to declare a deed a mortgage.[18]

§ 209. Jurisdiction of subject-matter

Jurisdiction of the subject-matter is the power to deal with the general subject involved in the action.[19]

It is to be determined from the allegations of the petition, and, if the petition fails to disclose such facts as will authorize a court of equity to hear and determine the matter complained of, such court is without jurisdiction.[20]

Where the necessary parties are before a court of equity, it is immaterial that the res of the controversy is beyond the territorial jurisdiction of the court, and it has the power to compel defendant to do all things necessary, according to the lex loci rei sitæ, which he could do voluntarily, to give full effect to the decree against him.[21]

A district court having jurisdiction of the holder of a title to land has jurisdiction to render a judgment requiring him to make a conveyance of it and to enforce such decree by process against him, where the land is situated in another state.[22]

§ 210. —— Trusts

The power to establish and enforce a constructive trust is a matter properly cognizable in a court of equity.[23] The rule which limits the jurisdiction of equity to cases where there is no adequate remedy at law does not apply.[24]

Where court of general jurisdiction has secured jurisdiction of parties holding legal titles to land in another state, it may impress trust as to such land and order trustees to execute conveyance.[25]

[18] Clark v. Shoesmith, 139 P. 426, 91 Kan. 797.
[19] Glacken v. Andrew (Okl.) 169 P. 1096.
[20] Myers v. Berry, 41 P. 580, 3 Okl. 612.
[21] Gordon v. Munn, 106 P. 286, 81 Kan. 537, 25 L. R. A. (N. S.) 917.
[22] People's State Bank v. T'Miller, 116 P. 884, 85 Kan. 272.
[23] Goldrick v. Roxana Petroleum Co. (Okl.) 176 P. 932; McCoy v. McCoy, 121 P. 176, 30 Okl. 379, Ann. Cas. 1913C, 146.
[24] Goldrick v. Roxana Petroleum Co. (Okl.) 176 P. 932.
[25] Meador v. Manlove, 156 P. 731, 97 Kan. 706.
When a district court has jurisdiction of the parties, it has jurisdiction to

The district court has jurisdiction of the subject-matter of an action to declare a resulting trust, where it has acquired jurisdiction of the parties thereto.[26]

Equity will not permit a trust to fail for want of a trustee.[27]

§ 211. Consent and waiver

Jurisdiction of the person may be conferred by consent, or the want thereof waived by voluntary appearance,[28] but parties cannot by consent or stipulation invest a court with jurisdiction not given by law, and this rule applies to causes involving the necessary jurisdictional amount.[29]

enforce trusts, although in so doing the title to land which does not lie within its territorial limits is incidentally affected. Manley v. Carter, 52 P. 915, 7 Kan. App. 86.

[26] Bockfinger v. Foster, 62 P. 799, 10 Okl. 488, judgment affirmed 23 S. Ct. 836, 190 U. S. 116, 47 L. Ed. 975.

[27] Hill v. Hill, 49 Okl. 424, 152 P. 1122.

[28] Hobbs v. German-American Doctors, 78 P. 356, 14 Okl. 236.

Where the district court had original jurisdiction of the subject-matter, and the case comes into that court improperly by appeal, and both parties appear and go to trial without objection, the question of jurisdiction as to the manner of getting in court is waived. School Dist. No. 94, Grant County, v. Gautier, 73 P. 954, 13 Okl. 194.

Where a trustee under a chattel mortgage brings an action to enforce his trust, he thereby confers on the court in which the action is brought jurisdiction over him in regard to the settlement of a counterclaim interposed by defendant concerning the same transaction, though such jurisdiction does not otherwise exist, under Code Civ. Proc. § 55, providing that actions, with certain exceptions mentioned, must be brought in the county where the defendants or some of them reside or may be summoned. Wyman v. Herard, 59 P. 1009, 9 Okl. 35.

Where receivers of a railroad contest matters at issue in proceedings to enforce a lien against railroad property, they cannot be heard for the first time after an adverse decision to complain that the court was without jurisdiction, even though they were appointed by another court. Trocon v. Scott City Northern R. Co., 139 P. 357, 91 Kan. 887.

Where jurisdiction of the person is lost by irregularities, it may be restored by the appearance or waiver of the defendants or failure to duly object. Hobbs v. German-American Doctors, 78 P. 356, 14 Okl. 236.

Where local and nonresident defendants were jointly sued and nonresident defendant appeared generally without raising question of jurisdiction, his demurrer to evidence and his motion to dismiss for want of jurisdiction were properly overruled. Makemson v. Edwards, 101 Kan. 269, 166 P. 508.

As to appearance, see post, §§ 506–511.

[29] Model Clothing Co. v. First Nat. Bank of Cushing, 61 Okl. 88, 160 P. 450.

The question of jurisdiction of the subject matter cannot be waived by the parties, and the court should, on its own motion, though the question be not

Filing a demurrer to a petition and moving to make it more definite is not a request for affirmative relief, such as will waive defendant's objection to jurisdiction over his person. Where defendant's objection to the court's jurisdiction of his person has been overruled, he may defend without waiving his objection; but where he asks affirmative relief after his objection to jurisdiction over his person has been overruled, he waives such objection.[30]

§ 212. Ancillary jurisdiction

A court having possession of property may determine all questions relative to title, possession, and control of same.[31]

§ 213. Rule of comity

Where actions are properly brought and are pending in different jurisdictions, the rule of comity does not influence the proceedings of the court to which jurisdiction first attaches.[32]

The laws of another state will not be given force in this state as a matter of comity, where it would be, in effect, to overturn the policy of this state with respect to such cases, or be in violation of our express statute.[33]

Comity does not require that the courts of Oklahoma uphold foreign contracts violative of the penal statutes or public policy of Oklahoma, regardless of the validity of such contracts in the state where they were made.[34] But the rule that a penal statute will not be enforced outside the territorial jurisdiction of the Leg-

raised by the parties, inquire into its jurisdiction. Apache State Bank v. Voight (Okl.) 161 P. 214.

Where the statute confers on the road viewers and the board of county commissioners power to determine whether or not a proposed public road is of public utility, the parties to proceedings for laying out a road cannot by agreement confer on the court the power to determine such question on appeal from an award of damages made by the commissioners after determining the question in the affirmative. Van Bentham v. Osage County Com'rs, 30 P. 111, 49 Kan. 30.

[30] Commonwealth Cotton Oil Co. v. Hudson, 62 Okl. 23, 161 P. 535.

[31] Darrough v. First Nat. Bank of Claremore, 56 Okl. 647, 156 P. 191.

The ancillary jurisdiction of a court to determine all questions as to rights in property of which it has taken possession, may be exercised by federal courts, though not authorized by statute. Id.

[32] Missouri, K. & T. Ry. Co. v. Bradshaw, 132 P. 327, 37 Okl. 317.

[33] Mackey v. Pettijohn, 49 P. 636, 6 Kan. App. 57.

[34] Coffe & Carkener v. Wilhite, 56 Okl. 394, 156 P. 169.

islature enacting it applies only to statutes entirely penal, and not to those which are in part compensatory.[35]

§ 214. Shown by record

The county court, while of limited jurisdiction, is a court of record, and not an inferior court in the sense that its judgment may be disregarded because jurisdictional facts do not appear on the face of its proceedings.[36]

The general rule that the silence of the record of an inferior tribunal on a jurisdictional point is fatal applies in cases of col-

[35] Great Western Machinery Co. v. Smith, 124 P. 414, 87 Kan. 331, 41 L. R. A. (N. S.) 379, Ann. Cas. 1913E, 243.

Rev. St. Mo. 1909, § 3151, making railroads responsible for loss by fire, being compensatory and remedial, may be enforced in an action in Kansas. Hollinger v. Missouri, K. & T. Ry. Co., 146 P. 1034, 94 Kan. 316, Ann. Cas. 1916D, 802.

A contract of purchase made in Missouri contrary to Rev. St. 1899, §§ 8965, 8966 (Ann. St. 1906, pp. 4150, 4152), relating to pools, trusts, and monopolies, subject to be defeated when sought to be enforced in that state by section 8970 (page 4153), providing that such purchasers shall not be liable for the price, but may treat the violation of the statute as a defense, when sought to be enforced in Oklahoma, is subject to the same defense under the laws of comity between different states; the provisions of section 8970 not being contrary to the public policy of the state. Wagner v. Minnie Harvester Co., 106 P. 969, 25 Okl. 558.

A cause of action accrued in Kansas under Laws Kan. 1907, c. 281, § 1, making every railroad liable for damages to any employé in consequence of negligence of its agents, or by any mismanagement of its engineers or other employés. Const. Okl. art. 9, § 36, concurs in holding that the act complained of under the Kansas statute gives a right of action. Held, that the Kansas statute is not against the public policy of Oklahoma, and, although the right of action exists by statute, and not by the common law, it may be enforced in the courts of Oklahoma. Chicago, R. I. & P. Ry. Co. v. McIntire, 119 P. 1008, 29 Okl. 797.

A Nebraska statute, providing that an attorney who was guilty of fraud and deceit shall forfeit treble damages, imposes a penalty, and is not enforceable in Oklahoma. Mohr v. Sands, 44 Okl. 330, 133 P. 238.

[36] Rogers v. Duncan, 57 Okl. 20, 156 P. 678.

County courts are entitled to the same presumption of jurisdiction as district courts. Ex parte Brown, 105 P. 577, 3 Okl. Cr. 329.

In proceedings properly before the probate court and within its jurisdiction, it is not necessary that its judgment should contain a recitation of the facts on which the jurisdiction of the court depends. Greer v. McNeal, 69 P. 891, 11 Okl. 519, judgment affirmed 69 P. 893, 11 Okl. 526; Cooper v. Newcomb (Okl.) 174 P. 1029; Holmes v. Holmes, 111 P. 220, 27 Okl. 140, 30 L. R. A. (N. S.) 920.

lateral attack to those jurisdictional facts only which the law directs the tribunal to enter on its record.[37]

§ 215. Determination of jurisdiction

Courts have inherent power to inquire into their jurisdiction.[38]

Where the jurisdiction of the court depends on a fact which it is required to ascertain and decide, its judgment determining that fact does exist is conclusive evidence of jurisdiction until set aside or reversed by direct proceedings.[39]

While superior courts will construe the proceedings of inferior tribunals with regard to mere irregularities with great liberality, so as to uphold such proceedings, yet they will also rule strictly with regard to matters of jurisdiction, for the purpose of keeping such inferior tribunals strictly within the limits of their jurisdiction.[40]

§ 216. Objections

When the court has no jurisdiction of the subject-matter, either party to the suit may avail himself of the objection at any stage, and the court on its own motion will refuse to proceed further, and dismiss the case when its attention is called to the fact.[41]

[37] Gehlenberg v. Hartley, 165 P. 286, 100 Kan. 487.

Presumptions.—An action was commenced in the district court to reform a real estate mortgage and to foreclose the same. Service of summons was obtained by publication. From the affidavit for service it appeared that defendant had removed from the county and resided in the region of the country known as Pike's Peak, and that service of summons could not be made on defendant. The date of the filing of the affidavit was not shown. Held that, in the absence of any showing to the contrary, it would be presumed that the district court had jurisdiction to render a judgment reforming and foreclosing the mortgage. Carey v. Reeves, 5 P. 22, 32 Kan. 718.

Where judgment is rendered by the district court under Laws 1877, c. 39, relating to the collection of delinquent taxes on land bid in by counties at tax sales, etc., and a sheriff's deed founded thereon, and an admission of the parties that the files of the court are lost and cannot be found, are in evidence, they are sufficient, aided by the presumption that jurisdiction was rightfully assumed, to show jurisdiction to render the judgment, if nothing to the contrary is shown. English v. Woodman, 21 P. 283, 40 Kan. 752.

Circuit courts in Ohio are presumed to be courts of general jurisdiction. Poll v. Hicks, 72 P. 847, 67 Kan. 191.

[38] Adair v. Montgomery (Okl.) 176 P. 911; Washburn v. Delaney, 30 Okl. 789, 120 P. 620.

[39] In re Wallace, 89 P. 687, 75 Kan. 432.

[40] State v. Horn, 9 P. 208, 34 Kan. 556.

[41] Myers v. Berry, 41 P. 580, 3 Okl. 612.

ARTICLE II

ORIGINAL, CONCURRENT, AND APPELLATE JURISDICTION

Sections

217. Concurrent jurisdiction.
218. Personal injuries.
219. Appeals—From police judges and justices of the peace.
220. From town justice court.
221. From county commissioners.
222. How taken.
223. State and federal courts.
224. Transfer of causes.
225. Transfer to state courts.
226. County courts—Jurisdiction—Judge pro tempore.
227. Amount involved.
228. Probate jurisdiction—Sessions.
229. Title involved.
230. Bastardy proceedings.
231. Appellate jurisdiction.
232. District courts.
233. Special cases.
234. Amount involved.
235. Appeals from county court.
236. Appeals in probate cases.
237. Indians and Indian lands.
238. Indian lands.
239. Misconduct in office.
240. Taxes and assessments.
241. Public lands.
242. Vested when—Exemption from taxation.
243. Equity.
244. Foreclosure.
245. Superior courts.
246. Supreme Court.
247. Appeals from county court.

§ 217. Concurrent jurisdiction

Concurrent jurisdiction means the jurisdiction of several different tribunals, each authorized to deal with the same subject-matter.[42]

Where proceedings are commenced relative to the same subject-matter in two courts having equal concurrent jurisdiction, the court which first issued its process will be deemed to have been the first to take jurisdiction of the subject-matter, and hence entitled to retain possession of the proceedings to the exclusion of the other

[42] Oklahoma Fire Ins. Co. v. Phillip, 111 P. 334, 27 Okl. 234.

court, though the process of the latter was served before that of the former.[43]

Between courts of equal authority, that one which first obtains jurisdiction will be permitted to pursue it to the end to the exclusion of all others, and will not permit its jurisdiction to be subverted by resort to some other tribunal.[44]

The rule that possession of property of which one court has taken jurisdiction cannot be interfered with by a court of concurrent jurisdiction merely protects the immediate possession of the first court, and does not deprive another court of jurisdiction to determine controversies over the same property. Thus a state court's jurisdiction to cancel a deed conveying a right of way to a railroad company is not ousted by the pendency of a former suit in federal court to foreclose a mortgage given by the railroad company on its right of way.[45]

§ 218. Personal injuries

"The right of action to recover damages for personal injuries not resulting in death arising and occurring in hazardous employments, * * * except the right of action reserved to the State Industrial Commission for the benefit of an injured employee, * * * is * * * abrogated, and all jurisdiction of the courts of this state over such causes, except as to the causes reserved to the State Industrial Commission for the benefit of injured employees, * * * is * * * abolished."[46]

§ 219. Appeals—From police judges and justices of the peace

"In addition to the jurisdiction and powers conferred upon dis-

[43] Chicago, K. & W. R. Co. v. Harris, 21 P. 1071, 42 Kan. 223.

[44] Ewing v. Mallison, 70 P. 369, 65 Kan. 484, 93 Am. St. Rep. 299.

As between courts of concurrent jurisdiction, that court first acquiring jurisdiction may draw to itself all the pertinent issues between the parties, and enjoin other courts from interfering. Juhlin v. Hutchings, 135 P. 598, 90 Kan. 618, judgment affirmed on rehearing 136 P. 942, 90 Kan. 865.

As a general rule, a court which first acquires the custody and control of property and assets by the appointment of a receiver will retain such control until the end of the litigation, to the exclusion of interference by other courts of concurrent jurisdiction. Missouri Pac. Ry. Co. v. Love, 59 P. 1072, 61 Kan. 433; Martin v. Harnage, 110 P. 781, 26 Okl. 790, 38 L. R. A. (N. S.) 228; Lanyon v. Braden, 48 Okl. 689, 150 P. 677.

[45] Brown v. Stuart, 133 P. 725, 90 Kan. 302.

[46] Sess. Laws 1915, p. 603, art. 6, § 2.

tricts courts by the Constitution and other statutes, the said district courts, concurrent with the county and superior courts, shall have jurisdiction of appeals from police judges and from justices of the peace in civil and criminal cases; but in all such appeals there shall be a trial de novo on questions of both law and fact." [47]

§ 220. —— From town justice court

In all cases before a justice of the peace of any town, "an appeal may be taken by the defendant to the county superior or district court of the county in which such town is situated; but no appeal shall be allowed unless such defendant shall within ten days enter into recognizance with sufficient securities, to be approved by such justice of the peace, conditioned for the payment of the fine and costs and costs of appeal, and that he will render himself in execution thereof if it should be determined against the appellant." [48]

§ 221. —— From county commissioners

"From all decisions of the board of commissioners, upon matters properly before them, there shall be allowed an appeal to the district court by any persons aggrieved, including the county by its county attorney, upon filing a bond with sufficient penalty, and one or more sureties to be approved by the county clerk, conditioned that the appellant will prosecute his or her appeal without delay, and pay all cost that he or she may be adjudged to pay in the said district court; said bond shall be executed to the county, and may be sued in the name of the county upon breach of any condition therein: Provided, that the county attorney, upon the written demand of at least fifteen (15) freeholders of the county, shall take an appeal from any action of the board of county commissioners when said action relates to the interests or affairs of the county at large or any portion thereof, in the name of the county, when he deems it to the interest of the county so to do; and in such case no bond shall be required or given and upon serving the notice provided for in the next section the county clerk shall proceed the same as if a bond had been filed." [49]

[47] Rev. Laws 1910, § 1778.

[48] Rev. Laws 1910, § 734.

[49] Sess. Laws 1915, p. 205, § 1, amending Rev. Laws 1910, § 1640.

Where a petition was presented to the board of county commissioners, requesting the laying out of a highway, under St. 1893, p. 1067, c. 72, and the

On appeal from county commissioners pursuant to the statute, the district court takes appellate jurisdiction only, and cannot convert the action into one in equity, so as to enlarge its jurisdiction beyond that of the similar tribunal.[50]

"All appeals thus taken to the district court shall be docketed as other causes pending therein, and the same shall be heard and determined de novo." [51]

§ 222. —— How taken

"Said appeal shall be taken within twenty days after the decision of said board, by serving a written notice on one of the board of county commissioners, and the clerk shall, upon the filing of the bond as hereinbefore provided, make out a complete transcript of the proceedings of said board relating to the matter of their decision

board granted the petition and appointed viewers, who established a line and reported the proceedings to the county commissioners, which report was approved and the road ordered opened, an owner of land over which the road was established, without asking for any damages, could not appeal from the decision of the board to the district court. Cummings v. Board of Com'rs of Noble County, 73 P. 288, 13 Okl. 21.

An appeal lies, under St. 1893, c. 22, art. 9, § 37, from a decision of the county commissioners that an election on a proposition to permit cattle free range is a resubmission of that proposition to the voters, under chapter 2, art. 2 (Herd Law) § 4. Board of Com'rs of Washita County v. Haines, 46 P. 561, 4 Okl. 701.

Where county commissioners overruled a protest against the location of a bridge and proceeded to let the contract therefor, held, that such action was not a decision "on a matter properly before it" from which an appeal would lie to the district court under Rev. Laws 1910, § 1640. Parker v. Board of Com'rs of Tillman County, 139 P. 981, 41 Okl. 723.

The decision of county commissioners as to location of a county courthouse and jail is a "decision" from which appeal will lie to district court pursuant to Rev. Laws 1910, § 1640, as amended by Laws 1915, c. 117. In re Courthouse of Okmulgee County, 58 Okl. 683, 161 P. 200. In contest before county commissioners between owners of property offered as donation for courthouse site, on appeal from action of the board under Rev. Laws 1910, § 1640, as amended by Laws 1915, c. 117, and section 1641, notice need not be served on the owners of the site selected. Id.

[50] Parker v. Board of Com'rs of Tillman County, 139 P. 981, 41 Okl. 723.

Jurisdiction of district court, on appeal from county commissioners in proceeding to recover taxes erroneously assessed, cannot be enlarged into an equitable action to recover same beyond commissioners' jurisdiction. Smith v. Board of Com'rs of Garvin County, 62 Okl. 120, 162 P. 463.

[51] Rev. Laws 1910, § 1643.

thereon, and shall deliver the same to the clerk of the district court." [52]

An appeal from the action of the county commissioners is a statutory method by which the district court may obtain jurisdiction of the cause and of the parties and make judicial determination, and does not preclude one, whose claim has been disallowed, from beginning an action by filing a petition and causing issuance and service of summons.[53]

"Said appeal shall be filed by the first day of the district court next after such appeal and said cause shall stand for trial at such term." [54]

§ 223. State and federal courts

A suit against a national bank for penalty for usury is cognizable in a state court having general jurisdiction of suits to recover usury, and such court is not divested of jurisdiction in the absence of demand for the return of the usury by the fact that the state statute requires a demand in actions thereunder.[55]

The state courts have jurisdiction of actions against an initial carrier for damages for delay in the transportation of a shipment, though defendant's liability is created by the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa), making the initial carrier liable for damages from delay.[56]

The enforcement of the Act of Congress regulating the liability of interstate railway carriers for injury to employees while engaged in interstate commerce is not restricted to the federal courts, in view of the Judiciary Act recognizing concurrent jurisdiction in the state courts.[57]

A United States District Court, having taken jurisdiction of a suit to avoid an allotment and patent, and having appointed a re-

[52] Rev. Laws 1910, § 1641.

[53] Board of Com'rs of Atoka County v. Cypert (Okl.) 166 P. 195.

[54] Rev. Laws 1910, § 1642.

[55] Commercial Nat. Bank of Checotah v. Phillips, 61 Okl. 179, 160 P. 920. Actions against a national bank for knowingly charging a usurious rate of interest in violation of Rev. St. U. S. §§ 5197, 5198 (U. S. Comp. St. §§ 9758, 9759), may be maintained in any state court having jurisdiction in similar cases where the bank is located. Farmers' Nat. Bank of Wewoka v. McCoy, 141 P. 791, 42 Okl. 420, Ann. Cas. 1916D, 1243.

[56] Ft. Smith & W. R. Co. v. Awbrey & Semple, 39 Okl. 270, 134 P. 1117.

[57] Missouri, K. & T. Ry. Co. v. Lenahan, 39 Okl. 283, 135 P. 383.

ceiver to make oil and gas leases, etc., can retain control of the property until it fully effectuates its judgment, free from interference of any other court, and an intervener in such suit, therein assigning certain oil rights to property in receivership, pending the case in such court, cannot litigate his claim to royalty by virtue of an assignment in a state court.[58]

A defendant charged with violating a state law and out on bail may be arrested by federal authorities without violating the comity existing between the two jurisdictions.[59]

Where plaintiff asserted only one right to recover for death of a railroad employé from defendant's negligence, whether the right of action arose under the federal act or under the state law it was equally cognizable in state court.[60]

§ 224. Transfer of causes

An order transferring a will contest from the superior to the district court on motion of contestants, is valid,[61] as is also a transfer to the superior court from the district court.[62]

After a cause has been legally transferred from a superior to a district court, jurisdiction of the superior court is lost, and any further proceeding is a nullity, and this is true as to its order revoking the order transferring the cause from the superior to the district court.[63] Irregularities in the transfer of a case from a district court to a superior court may be waived by the parties, and, when so waived, any judgment rendered by the superior court within its jurisdiction will be valid.[64]

A required notice of desire to transfer a cause is waived where the opposite party is present at the time the motion for removal is

[58] Black Panther Oil & Gas Co. v. Swift (Okl.) 170 P. 238.

[59] Metcalf v. State, 57 Okl. 64, 156 P. 305, L. R. A. 1916E, 595.

[60] Lusk v. Phelps (Okl.) 175 P. 756.

[61] In re Nichols' Will, 64 Okl. 241, 166 P. 1087.

[62] Parker v. Hamilton, 49 Okl. 693, 154 P. 65; State v. Superior Court of Pottawatomie County, 38 Okl. 366, 132 P. 1077.

[63] In re Nichols' Will, 64 Okl. 241, 166 P. 1087.

[64] Price v. Peeples (Okl.) 168 P. 191; Parker v. Hamilton, 49 Okl. 693, 154 P. 65.

A case pending on appeal in the county court from a justice of the peace court may be transferred on motion of plaintiff to a superior court. Yarborough v. Richardson, 38 Okl. 11, 131 P. 680; Oklahoma Fire Ins. Co. v. Phillip, 111 P. 334, 27 Okl. 234.

made and participates in the hearing without objection based on want of notice.[65]

§ 225. —— Transfer to state courts

Courts of original jurisdiction, after statehood, are deemed successors of all courts of original jurisdiction in the territories, and take custody of all records and files of such territorial courts.[66]

The district court of the state is the successor to the territorial district court for the purpose of correcting the record of a judgment rendered by the territorial court.[67]

The right to have a case transferred to the federal court is waived by failure to object to its transfer to the Oklahoma Supreme Court.[68]

§ 226. County courts—Jurisdiction—Judge pro tempore

"The county court, coextensive with the county, shall have original jurisdiction in all probate matters, and until otherwise provided by law, shall have concurrent jurisdiction with the district court in civil cases in any amount not exceeding one thousand dollars, exclusive of interest: Provided, that the county court shall not have jurisdiction in any action for malicious prosecution, or in any action for divorce or alimony, or in any action against officers for misconduct in office, or in actions for slander or libel, or in actions for the specific performance of contracts for the sale of real estate, or in any matter wherein the title or boundaries of land may be in dispute or called in question; nor to order or decree the partition or sale of real estate, not arising under its probate jurisdiction.

[65] Rauh v. Morris, 137 P. 1174, 40 Okl. 288.

[66] Where a proceeding to probate a will, instituted in the United States Court at Wewoka, was transferred after statehood to the district court of Seminole county, pursuant to Const. Schedule, § 27, and transferred, pursuant to section 23, to the county court of that county, which transferred it to the county court of Hughes county, wherein it was pending when a petition to set aside a probate of the will was filed, held, that it was proper to file the petition in the court last mentioned. Scott v. McGirth, 139 P. 519, 41 Okl. 520; Eaves v. Mullen, 107 P. 433, 25 Okl. 679; Burdett v. Burdett, 109 P. 922, 26 Okl. 416, 35 L. R. A. (N. S.) 964; MaHarry v. Eatman, 116 P. 935, 29 Okl. 46; Harris v. Lynch, 116 P. 942, 29 Okl. 349; Reeves v. Territory, 101 P. 1039, 2 Okl. Cr. 351; Crump v. Pitchford, 104 P. 911, 24 Okl. 808; Southern Surety Co. v. State, 127 P. 409, 34 Okl. 781.

[67] Ex parte Howland, 104 P. 927, 3 Okl. Cr. 142, Ann. Cas. 1912A, 840.

[68] Choctaw, O. & G. R. Co. v. Sittel, 97 P. 362, 21 Okl. 679.

"It shall have such appellate jurisdiction of the judgments of justices of the peace in civil and criminal cases as may be provided by law, or in this Constitution. The county court shall have jurisdiction concurrent with justices of the peace in misdemeanor cases, and exclusive jurisdiction in all misdemeanor cases of which justices of the peace have not jurisdiction. In the absence of the judge of the district court from the county, or in case of his disqualification for any reason, the county court, or judge thereof, shall have power to issue writs of injunction in matters about to be brought or pending in the district court; and to issue writs of injunction, mandamus, and all writs necessary to enforce the jurisdiction of the county courts; and issue writs of habeas corpus in cases where the offense charged is within the jurisdiction of the county court or any other court or tribunal inferior to said court."

"When the county judge is disqualified in any case pending in the county court, a judge pro tempore may be selected in the manner provided for the selection of judges pro tempore in the District Court." [69]

"County courts, in their respective counties, in addition to such jurisdiction and powers as are conferred by the state Constitution." coextensive with the county, shall have original jurisdiction in all probate matters and bastardy proceedings, and shall have concurrent jurisdiction with the district court in civil cases in any amount not exceeding one thousand ($1,000.00) dollars, exclusive of interest: Provided, that the county court shall not have jurisdiction in any action for malicious prosecution, or in any action for divorce or alimony, or in any action against officers for misconduct in office, or in actions for slander or libel, or in actions for the specific performance of contracts for the sale of real estate, or in any matter wherein the title or boundaries of land may be in dispute or called in question; nor to order or decree the partition or sale of real estate, or in any matter wherein the title or boundaries of land may be in dispute or called in question; nor to order or decree the partition or sale of real estate, not arising under its probate jurisdiction; and, provided, further, that in any civil action in the county court where the title or boundaries of land may be called in ques-

[69] Const. Okl. art. 7, § 12.

tion, said action shall be transferred to the district court in the same manner and upon the same grounds, and be proceeded with therein, as provided for similar actions before justices of the peace." [70]

The county court has exclusive jurisdiction of proceedings to suspend an officer in a prosecution for a misdemeanor.[71]

County courts have only such jurisdiction as is granted by the Constitution and statutes enacted in harmony therewith,[72] but the inclusion of a prayer for additional relief beyond the county court's jurisdiction will not deprive such court of jurisdiction or prevent it from granting such relief within its jurisdiction as would be consistent with the pleadings and evidence.[73]

§ 227. —— Amount involved

Under the act of 1917, county courts have jurisdiction of civil cases involving $200 or less,[74] and decisions that the county court had no such jurisdiction are now inapplicable.[75]

[70] Sess. Laws 1917, p. 184, § 1, amending Rev. Laws 1910, § 1816.

[71] State ex rel. Ikard v. Russell, 33 Okl. 141, 124 P. 1092.

Wilson's Rev. & Ann. St. 1903, § 2630, conferring on district courts jurisdiction of actions under section 2628, and that portion of section 2631 conferring on district courts in actions under section 2628 authority to suspend from office certain officers pending such action, was not continued in force on the admission of the state in so far as they are repugnant to Const. art. 7, § 12, conferring jurisdiction on the county court. State v. Shea, 115 P. 862, 28 Okl. 821.

[72] Ozark Oil Co. v. Berryhill, 43 Okl. 523, 143 P. 173; Const. art. 7, § 12; Crump v. Pitchford, 24 Okl. 808, 104 P. 911; In re Johnson (Okl.) 179 P. 605.

Statutes in harmony.—Const. art. 7, § 14 (Bunn's Ed. § 186), providing that the county court shall have jurisdiction of all cases on appeals from justices of the peace, does not preclude the conferring of appellate jurisdiction on the county court in a proceeding for the assessment and collection of taxes on omitted property. Anderson v. Ritterbusch, 98 P. 1002, 22 Okl. 761.

[73] Antene v. Jensen, 47 Okl. 352, 148 P. 727.

[74] Moline Plow Co. v. Adair, 76 Okl. 4, 183 Pac. 499.

All cases heretofore filed in the county courts for amounts of less than two hundred ($200.00) dollars, shall be deemed to have been validly filed on the day the petition and præcipe for summons were filed and the action shall be deemed to have been legally commenced on said day, and all proceedings had in the county courts in cases brought for less than two hundred ($200.00) dol-

[75] *Inapplicable decisions.*—Musser v. Baker, 53 Okl. 782, 158 P. 442; Barry v. Easter Drug Co., 53 Okl. 799, 158 P. 443; First National Bank of Poteau v. School District No. 49 of Hughes County, 61 Okl. 45, 160 P. 68; Underwood Typewriter Co. v. March, 61 Okl. 129, 160 P. 594; Ashbaugh v. Rousch, 62 Okl. 96, 162 P. 205.

Where the amount claimed exceeds the maximum statutory jurisdictional limit of the court, it is without power to proceed with a hearing.[76]

The prayer of the pleading determines the jurisdiction of the court and fixes the amount of controversy.[77]

Interest should be excluded in determining the jurisdictional amount involved.[78]

§ 228. —— Probate jurisdiction—Sessions

"The county court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis, and common drunkards; grant letters testamentary and of administration, settle accounts of executors, administrators, and guardians; transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons non compos mentis, and common drunkards, including the sale, settlement, partition, and distribution of the estates thereof. The county court shall be held at the county seat, but the Legislature may provide for holding sessions of the county court at not more than two additional places in the county: Provided, that alternate sessions of county court in Le Flore county shall be held at Talihina." [79]

lars, shall be deemed legal and valid and any such case which has been dismissed on the ground of want of jurisdiction may be reinstated on motion, a copy of which motion shall be served by the applying party upon the opposite party or his attorney of record the same as before the adoption of the Revised Laws of 1910. Sess. Laws 1917, p. 184, § 2.

The original jurisdiction of county courts in civil cases conferred by Const. art. 7, § 12, was not changed by Comp. Laws 1909, §§ 1977, 1978, so as to deprive them of jurisdiction where the amount involved does not exceed $200. Miller v. Mills, 122 P. 671, 32 Okl. 388; First Nat. Bank v. Langston, 124 P. 308, 32 Okl. 795; State Bank of Paden v. Lanam, 126 P. 220, 34 Okl. 485; First Nat. Bank v. Latham, 132 P. 891, 37 Okl. 286; First Nat. Bank v. Ingle, 132 P. 895, 37 Okl. 276; Cooper v. Austin, 30 Okl. 297, 119 P. 206.

[76] St. Louis & S. F. Ry. Co. v. Egbert, 111 P. 202, 27 Okl. 168.

[77] Oliver v. White (Okl.) 176 P. 946.

[78] St. Louis & S. F. R. Co. v. Wynn, 54 Okl. 482, 153 P. 1156.

Under Const. art. 7, § 12, giving county court concurrent jurisdiction with district court in civil cases, and in view of Rev. Laws 1910, § 2848, where amount does not exceed $1,000, exclusive of interest, interest on damages from negligent delay in shipment of live stock by shrinkage and declining market should be excluded, in determining maximum jurisdictional amount

[79] Const. Okl. art. 7, § 13.

The county court of the state, as to all causes, jurisdiction of which is conferred upon it by the Constitution, and which theretofore had been in the probate court of the territory, is a successor of such probate court, and the statute subscribing the procedure in the trial and disposition of cases in the probate court governs in the county court so far as not in conflict with the Constitution or inapplicable.[80]

A county court, coextensive with the county, is a court of original jurisdiction in all probate matters,[81] and may at any time before his majority modify or vacate any order or judgment regarding the estate of a minor.[82]

An action in the county court to vacate an order made in the exercise of the court's probate jurisdiction, distributing an estate, is an action under that court's probate jurisdiction,[83] as is a petition for withdrawal of a successful bid at a sale under order of the county court, by a guardian of oil royalties, for fraud of the guardian in stating the quantity of royalty and for a refund of a deposit.[84] But county courts have no jurisdiction where an oil and gas lease has been approved and a bonus of $1,600 paid to the guardian, to order him to repay said sum, on the ground that the approval

for which action may be brought in county court. St. Louis & S. F. R. Co. v. Ladd (Okl.) 178 P. 125.

[80] Baker v. Newton, 112 P. 1034, 27 Okl. 436. The enabling act (Act June 16, 1906, c. 3335, 34 Stat. 277) and the schedule to the Constitution give to the county court jurisdiction of cases which had theretofore been in the probate court of the territory, and put in force in the state the statutes in force in the territory prescribing procedure applicable to cases in the probate court. Held, that Wilson's Rev. & Ann. St. 1903, § 1880, providing that the probate court shall be open at all times for the trial of cases under the justice procedure, being inapplicable to the trial of civil cases in the county courts of the state, is to that extent not extended in force in the state upon its admission. Id.

[81] Scott v. McGirth, 139 P. 519, 41 Okl. 520.

The trial of the question of whether one petitioning for revocation of probate of a will is interested, and so entitled, under Code Civ. Proc. § 1327, to contest the will, or whether he lost all by a conveyance of his expectant estate, is within the jurisdiction of the probate court. In re Wickersham's Estate, 96 P. 311, 153 Cal. 603.

[82] Barnett v. Blackstone Coal & Mining Co., 60 Okl. 41, 158 P. 588; In re Johnson (Okl.) 179 P. 605.

[83] Southwestern Surety Ins. Co. v. King (Okl.) 174 P. 264.

[84] In re Southern Oil Corp. (Okl.) 168 P. 826.

of the lease was secured by fraudulent representations as to breach of conditions of a former lease by the lessee therein.[85]

A county court's attempted decree, partitioning restricted Indian lands, is void.[86]

§ 229. —— Title involved

The county court has no jurisdiction, where the title to land is involved.[87]

[85] In re Johnson (Okl.) 179 P. 605.

A proceeding in which a minor seeks a modification and cancellation of an oil lease made by order of court is not a probate proceeding. Ozark Oil Co. v. Berryhill, 143 P. 173, 43 Okl. 523.

[86] Lewis v. Gillard (Okl.) 173 P. 1136.

[87] *Title involved.*—Issues in a real estate broker's action for commission held not to involve title to the land so as to deprive the county court of jurisdiction. Everett v. Combs, 140 P. 152, 40 Okl. 645.

A petition in the county court alleging that defendants falsely represented to plaintiff that they had the right of possession of land for the succeeding year and induced plaintiff to lease the land from them and to pay a valuable consideration therefor, and that the title to said land was not in defendants or in the person under whom defendants claimed, and that defendants had no valid lease therefor, brought the title to land into question so that the county court, under Const. art. 7, § 12, had no jurisdiction. Couch v. McKoon, 122 P. 542, 31 Okl. 584.

The county court by reason of Const. art. 7, § 12, providing that the county court cannot have jurisdiction in any matter wherein the title to land may be in dispute, has no jurisdiction in a probate proceeding by a guardian for an order of sale of his ward's real estate to determine a claim of a third person to the real estate adverse to the ward. Jefferson v. Winkler, 110 P. 755, 26 Okl. 653.

Title not involved.—Title to land is not in dispute in an action on a grantor's covenant against taxes, and a probate court of the territory of Oklahoma or a county court of the state has jurisdiction. Loeb v. Loeb, 103 P. 570, 24 Okl. 384.

A motion to dismiss an action of forcible entry and detainer because the title to real estate was involved was improperly sustained; this being a possessory action in which title cannot be involved except incidentally. Cahill v. Pine Creek Oil Co., 38 Okl. 568, 134 P. 64.

In an action in the county court on a note, an answer, alleging that the note is for the balance of the price of real estate, title to which was defective, did not present a question as to the title to real estate ousting the jurisdiction. Taylor v. Cox, 136 P. 576, 39 Okl. 582. A mere statement of a conclusion in a pleading that the title to real estate was involved was insufficient to oust the jurisdiction of the county court. Id.

Under Const. art. 7, § 12, depriving the county court of jurisdiction where title is involved, etc., the county court has jurisdiction in a suit to recover

The district courts, and not the county courts, have jurisdiction of actions in ejectment and to remove cloud from title, since they call into question title to real estate.[88]

In an action by the grantee of a landlord for rent, where the tenant's answer denies the title of the plaintiff, but no evidence is introduced to show want of title, the county court is not ousted of jurisdiction;[89] but it is otherwise where the real issue is as to who owns the land and is entitled to the rent.[90]

§ 230. —— Bastardy proceedings

The county court is vested with the exclusive original jurisdiction in bastardy proceedings,[91] regardless of the amount involved.[92]

§ 231. —— Appellate jurisdiction

"Until otherwise provided by law, the county court shall have jurisdiction of all cases on appeals from judgments of the justices of the peace in civil and criminal cases; and in all cases, civil and criminal, appealed from justices of the peace to such county court, there shall be a trial de novo on questions of both law and fact." [93]

"The county court shall have, concurrent with the district court, appellate jurisdiction of judgments of justices of the peace, and of judgments of police judges, in all civil and criminal causes * * * and in all cases, civil and criminal, appealed from the justices of the peace and police judges, there shall be a trial de novo on questions of both law and fact." [94]

an alleged balance of the price of a town lot though defendant denies he ever bought the lot or owes anything. Waters v. Dore, 50 Okl. 183, 150 P. 885.

In actions founded on fraud and deceit the probate court has jurisdiction where the amount sought to be recovered is $1,000 or less, though the fraud induced the plaintiffs to purchase certain land, the action not being concerning any matter wherein the title or boundaries of land were in dispute, or on a contract for the sale of real estate, of which action the probate court has no jurisdiction, under St. 1893, § 1562. Newell v. Long-Bell Lumber Co., 78 P. 104, 14 Okl. 185.

88 Austin v. Chambers, 124 P. 310, 33 Okl. 40.

89 Sevy v. Stewart, 122 P. 544, 31 Okl. 589.

90 Marshall v. Burden, 106 P. 846, 25 Okl. 554.

91 Cummins v. State, 46 Okl. 51, 148 P. 137.

92 Wilson v. State (Okl.) 175 P. 829, overruling Cummins v. State, 46 Okl. 51, 148 P. 137.

93 Const. Okl. art. 7, § 14.

94 Rev. Laws 1910, § 1817.

§ 232. District courts

"The district courts shall have original jurisdiction in all cases, civil and criminal, except where exclusive jurisdiction is by this Constitution, or by law, conferred on some other court, and such appellate jurisdiction as may be provided in this Constitution, or by law. The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition, and other writs, remedial or otherwise, necessary or proper to carry into effect their orders, judgments, or decrees. The district courts shall also have the power of naturalization in accordance with the laws of the United States." [95]

This constitutional provision does not prevent the Legislature from conferring jurisdiction on county and superior courts, to the exclusion of the district court.[96]

§ 233. —— Special cases

Under specified circumstances the district court may change the limits of a town or city,[97] and may alter or vacate the whole or part of a town.[98] It has jurisdiction of actions by a ward against the estate of his former guardian and the surety on the guardian's bond, although the guardian had not accounted to the county court prior to his death.[99] It also has equitable jurisdiction in an action to set aside orders of the county court approving a guardian's final settlement, where such settlement and orders were procured by undue influence on wards and fraudulent representations to the court.[1]

[95] Const. Okl. art. 7, § 10.

Where a donor offered $10,000 to construct a library provided the city would donate the site and maintain the library which proposition the city accepted, the city's title to the property was that of trustee for the public, and the court had jurisdiction in a taxpayer's action to prevent the city's officers from using the building for city offices. Perry Public Library Ass'n v. Lobsitz, 130 P. 919, 35 Okl. 576, 45 L. R. A. (N. S.) 368.

[96] Poos v. Shawnee Fire Ins. Co., 37 Okl. 251, 130 P. 153.

[97] Rev. Laws 1910, § 504.

[98] Rev. Laws 1910, § 518.

[99] Morey v. Christian (Okl.) 169 P. 887.

In action in district court by ward against personal representative of guardian's sureties, the court had jurisdiction to adjust account of deceased guard-

[1] Francis v. Sperry, 176 P. 732.

"Any person who has been aggrieved by any act, rule or regulation of any of said boards of health, shall have his right of action to have such issue tried in the district court of the county in which some member of the board shall reside." [2]

Upon the filing of the report of each survey made by the county surveyor for the establishment of the corners and boundaries of lands, "any person served with the notice of the survey as herein provided, and being aggrieved by such survey, or the costs thereof, may at any time within thirty days after the filing of such report, appeal to the district court of the county by filing with the county surveyor a notice of his intention to appeal, in which notice he shall state in what particulars the survey as shown by such report is erroneous or fails to do him justice, or, if he appeals from the apportionment of costs alone, then in what particulars the costs stated in the cost bill are unauthorized or excessive, and by giving a bond with two sureties to be approved by and filed with the clerk of the district court, running to the said clerk and conditioned for the payment of the costs of the appeal if the report of the county surveyor shall be affirmed by the court. Upon the filing of such notice and bond, the county surveyor shall certify such appeal to the clerk of the district court, by filing with such clerk a certified copy of the report if the survey be appealed from, and the original notice of the appeal, but if the appeal be from his apportionment and assessment of costs, then by filing with such clerk a certified copy of his cost bill and the original notice of appeal." [3]

"The court shall hear and determine said appeal and enter an order or judgment approving or rejecting said report, or modifying or amending the same, or may refer the same back to the surveyor to correct his survey and report in conformity with the decree of the court, or may, for good cause shown, set aside the report and appoint one or more surveyors who shall proceed, at the time mentioned in the order of the court, to survey and determine the corners and boundaries of the land in question, and shall report the same to the court for further action." [4]

ian and allow and determine balance due by guardian and render judgment therefor. Asher v. Stull, 61 Okl. 320, 161 P. 808.

[2] Rev. Laws 1910, § 6819.

[3] Rev. Laws 1910, § 1721.

[4] Rev. Laws 1910, § 1722.

§ 234. —— Amount involved

The jurisdiction depends on the allegations of the petition and not the amount of the outstanding indebtedness as finally decided.[5] Interest forms no part of the amount in controversy as affecting jurisdiction, when the statute defining the court's jurisdiction excludes it from computation, and a claim for attorney's fee, not provided for in the contract and not recoverable under the statutes, cannot be added to the amount in controversy, so as to give the district court jurisdiction.[6]

§ 235. —— Appeals from county court

"Until otherwise provided by law, in all cases arising under the probate jurisdiction of the county court, appeals may be taken from the judgments of the county court to the district court of the county in the same manner as is now provided by the laws of the territory of Oklahoma for appeals from the probate court to the district court, and in all cases appealed from the county court to the district court, the cause shall be tried de novo in the district court upon questions of both law and fact." [7]

§ 236. —— Appeals in probate cases

"In all cases arising under the probate jurisdiction of the county court, appeals may be taken from the judgments of the county courts to the district court of the county, in the manner provided by law, and in all cases appealed from county court to the district court, the cause shall be tried de novo in the district court upon questions of both law and fact." [8]

[5] Farmers' & Merchants' Nat. Bank of Hobart v. School Dist. No. 56, 105 P. 641, 25 Okl. 284.

[6] St. Paul Fire & Marine Ins. Co. v. Peck, 130 P. 805, 37 Okl. 85; Humphrey v. Coquillard Wagon Works, 132 P. 899, 37 Okl. 714, 49 L. R. A. (N. S.) 600.

[7] Const. Okl. art. 7, § 16.

[8] Rev. Laws 1910, § 1820.

All appeals from the probate court, when exercising its jurisdiction in probate matters, must be to the district court, under St. 1893, c. 18, art. 13, § 14, whether the appeal is on questions of law or fact. Carpenter v. Russell, 73 P. 930, 13 Okl. 277.

When appeal lies.—In action in county court under Rev. Laws 1910, §§ 5267, 5269, to vacate an order made in the exercise of its probate jurisdiction in distributing an estate, an appeal lies to the district court under Const. art. 7, § 16. Southwestern Surety Ins. Co. v. King (Okl.) 174 P. 264.

From action of a county court in a probate matter, on a petition to with-

Such appeals must be taken in strict compliance with the statute.[9] They cannot be taken direct to the Supreme Court.[10]

Where notice is given and bond executed and approved for an appeal in a probate matter, the district court cannot dismiss the appeal until the transcript has been transmitted to the district court for filing.[11] In probate matters, where an appeal is taken from the county court to the district court, on questions of fact, or on questions of both law and fact, the trial in the district court must be de novo, and be conducted as if the case had lawfully originated in that court. The district court, in such cases, has general power to decide the questions of fact which the county court had, and in its discretion may order a jury trial of any or all mate-

draw a successful bid made at the sale under its order for an oil royalty, and to recover a deposit, an appeal lies to district court. In re Southern Oil Corp. (Okl.) 168 P. 826.

Under Rev. Laws 1910, § 1820, and Laws 1907–08, c. 27, art. 1, § 6, an appeal lies to the district court from the county court in probate matters. In re Theimer, 137 P. 358, 40 Okl. 235; Smith v. J. I. Case Threshing Mach. Co., 142 P. 1032, 43 Okl. 346.

In an action in the county court under Rev. Laws 1910, §§ 5267, 5269, to vacate an order in a probate matter, held that an appeal lies to the district court under Const. art. 7, § 16. Gray v. McKnight, 50 Okl. 73, 150 P. 1046. The term "civil cases," as used in section 15, art. 7, of the Constitution, * * * does not include any case arising under the probate jurisdiction of the county court. Id.

Under Const. art. 7, § 16, and Schedule, § 2, appeal held to lie to district court from county court in probate matters in cases in which appeal was allowed by Wilson's Rev. & Ann. St. 1903, § 1793 (Snyder's Comp. Laws 1909, § 5451). Apache State Bank v. Daniels, 121 P. 237, 32 Okl. 121, 40 L. R. A. (N. S.) 901, Ann. Cas. 1914A, 520.

[9] The right of an appeal from the county court to district court in a probate proceeding, being merely statutory, must be exercised in strict compliance with Rev. Laws 1910, §§ 6504, 6505, governing such right of appeal. Adair v. Montgomery (Okl.) 176 P. 911.

Under Rev. Laws 1910, § 6503, an affidavit by an applicant for appeal from the county court's order held a prerequisite to the granting of an appeal, and to conferring jurisdiction thereof on the district court. Baker v. Cureton, 49 Okl. 15, 150 P. 1090.

[10] An appeal from a judgment, decree, or order of the county court in probate cases will not lie direct from such court to the Supreme Court. Lucas v. Lucas, 125 P. 481, 34 Okl. 282. Under Const. art. 7, § 16, and Schedule, § 2, an appeal lies to the district court in probate matters in those cases in which an appeal was allowed by Wilson's Rev. & Ann. St. 1903, § 1793 (Comp. Laws 1909, § 5451). Id.

[11] In re Folsom's Estate, 57 Okl. 79, 159 P. 751.

rial questions of fact, which order must plainly and distinctly state the question to be tried.[12]

Where a petition to set aside an order authorizing the guardian of a minor to lease lands of his ward is denied, an appeal will lie therefrom to district court; the proceeding being a probate one.[13]

§ 237. —— Indians and Indian lands

Act Cong. June 7, 1897, fixes the territorial jurisdiction of the district court at Pawhuska in civil actions in which a member of the Osage and Kansas Tribes of Indians is a defendant as coextensive with the limits of the Osage reservation, and does not require that the defendant must reside upon lands, the Indian title to which has not been extinguished. The district court at Pawhuska, under Act Cong. June 7, 1897, has jurisdiction of a civil action, the defendant in which is a member of the Osage Tribe of Indians residing in the town of Pawhuska on a lot, the Indian title to which has been extinguished. Act Cong. March 3, 1901, affords to Indian traders at the Osage agency a cumulative remedy for the collection of their accounts against the Osage Indians, and does not oust the district court at Pawhuska of jurisdiction of an action on a note executed by an Osage Indian to an Indian trader, instituted March 6, 1907, where the note had not been presented to the Secretary of the Interior for adjustment under such act.[14]

§ 238. —— Indian lands

Where a contest between Indians is pending before the Commissioner as to allotment of lands, the state district court is without jurisdiction, and without power to enjoin contesting parties.[15]

A court of equity has power to grant relief in a case where the

[12] Tilman v. Tilman (Okl.) 177 P. 558.

[13] Barnett v. Blackstone Coal & Mining Co., 60 Okl. 41, 158 P. 588.

[14] De Noya v. Hill Inv. Co., 127 P. 444, 33 Okl. 663.

On January 19, 1906, the district court of Choctaw Nation did not have jurisdiction to decree divorce between Indians. Colbert v. Fulton (Okl.) 157 P. 1151.

[15] Bowen v. Ledbetter, 122 P. 131, 32 Okl. 513.

Ejectment will not lie against adverse claimant of town lot in Cherokee Nation in action by person claiming possession under deed from Cherokee Nation, while a contest as to the title before townsite commission having exclusive jurisdiction was undetermined. Tynon v. Hall, 98 P. 895, 22 Okl. 684.

Dawes Commission or the Secretary of the Interior were induced to cause to be issued a patent to land to the wrong person, where the issuance of such patent was occasioned by an erroneous view or construction of the law applicable, or to a gross or fraudulent mistake of facts; and in such a case the patent may be canceled, and the allottee held to be the trustee of the legal estate of such land, for the use and benefit of the one entitled thereto, and in such case the courts of this state have jurisdiction.[16] State courts have jurisdiction over controversies as to possession between the owner of an Indian allotment and a sublessee of the land for oil and gas mining purposes, although the oil and gas did not pass by the allotment, and though the original lease required that royalties be paid to the tribe, and although it may be necessary for such courts to construe acts of Congress, Indian treaties, and departmental leases and conveyances.[17]

The district court has jurisdiction of an action in ejectment or to remove cloud from title by heirs against the beneficiary of a will of a deceased Indian, probated before the admission of the state into the Union, affecting allotted lands of the Indian, where the heirs contend that the will did not devise the land, and that, if it attempted to do so, it was invalid.[18]

A full-blood Indian, being a citizen of the United States and of the state, has a right to sue in the state courts, and may have his rights growing out of treaties and acts of Congress relating to his land adjudicated, and such rights as may be protected at suit of the executive department of the federal government may also be enforced in state courts by an action by the Indian.[19]

District courts have jurisdiction of a partition suit of a tract allotted to a citizen of the Five Civilized Tribes, where such land descended to the heirs free of restrictions.[20] The district court cannot decree a judgment a lien against rents and profits accruing from the allotment of a minor Creek freedman,[21] nor has it jurisdiction of a suit by full-blood Indian heirs of a deceased Pawnee in-

16 Robinson v. Owen, 30 Okl. 484, 119 P. 995.
17 Kohlmeyer v. Wolverine Oil Co., 132 P. 497, 37 Okl. 477.
18 Austin v. Chambers, 124 P. 310, 33 Okl. 40.
19 Brown v. Anderson, 61 Okl. 136, 160 P. 724.
20 Griffin v. Culp (Okl.) 174 P. 495.
21 Tiger v. Read, 60 Okl. 106, 159 P. 499.

volving lands allotted to a decedent under General Allotment Act Feb. 8, 1887, as amended by Act Cong. Feb. 28, 1891, and the determination of title, and, incidentally, the rights to possession, of the allotment while held in trust by the United States.[22]

§ 239. —— Misconduct in office

Jurisdiction in all actions against officers for misconduct in office is in the district court.[23] The district court has jurisdiction of actions against township officers for misconduct in office.[24]

§ 240. Taxes and assessments

Proceedings for refund of taxes erroneously assessed and paid, have been held void; the sole method by which erroneous assessments involved might be corrected being by proceeding before the board of equalization and appeal.[25]

§ 241. Public lands

Exclusive jurisdiction in and over any lands in this State acquired "by the United States shall be, and the same is hereby ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this state; but the jurisdiction so ceded shall continue no longer than the United States shall own such lands." [26]

The courts cannot review the action of the interior department in its disposition of the public domain until after title has passed from the government.[27]

Courts of equity have power to inquire into and correct both judicial and executive action founded in fraud, mistake, or other special ground in equity, when private rights are invaded, and in the exercise of such jurisdiction may review the determination of the Land Office of the United States.[28] In other words, in a proceeding before the Land Department where fraud or imposition has been practiced on the party interested, or the officers of the

[22] Cæsar v. Krow (Okl.) 176 P. 927.
[23] State v. Russell, 124 P. 1092, 33 Okl. 141.
[24] McGuire v. Skelton, 129 P. 739, 36 Okl. 500.
[25] Atoka County v. Oklahoma State Bank, 62 Okl. 57, 161 P. 1087.
[26] Rev. Laws 1910, § 3191.
[27] Fitzgerald v. Keith, 48 P. 110, 5 Okl. 260.
[28] Estes v. Timmons, 73 P. 303, 12 Okl. 537, judgment affirmed (1905) 26 S. Ct. 85, 199 U. S. 391, 50 L. Ed. 241.

department, or where the latter have clearly mistaken the law applicable to the facts, equity may grant relief; but it is not authorized to re-examine into a mere question of fact, dependent on conflicting evidence, and to review the weight which the officers attached to such evidence.[29]

A court of equity will interfere with a decision of the officers of the Land Department only to prevent injustice by a misapplication of the law, or on account of fraud or imposition.[30]

A notice of the final decision of the Land Office on a motion to review is not an absolutely necessary condition precedent to the

[29] Thornton v. Peery, 54 P. 649, 7 Okl. 441; (1896) Paine v. Foster, 53 P. 109, 9 Okl. 213, judgment affirmed (1899) 59 P. 252, 9 Okl. 257; Id. (1900) 60 P. 24, 9 Okl. 259; Brown v. Donnelly, 59 P. 975, 9 Okl. 32; Calhoun v. Violet, 47 P. 479, 4 Okl. 321, judgment affirmed (1899) 19 S. Ct. 324, 173 U. S. 60, 43 L. Ed. 614; Wilbourne v. Baldwin, 47 P. 1045, 5 Okl. 265; McDonald v. Brady, 60 P. 509, 9 Okl. 660; Hammer v. Hermann, 65 P. 943, 11 Okl. 127; Hartwell v. Havighorst, 66 P. 337, 11 Okl. 189, judgment affirmed (1906) 25 S. Ct. 793, 196 U. S. 635, 49 L. Ed. 629; Jordan v. Smith, 73 P. 308, 12 Okl. 703; Parryman v. Cunningham, 82 P. 822, 16 Okl. 94; Greenameyer v. Coate, 88 P. 1054, 18 Okl. 160, judgment affirmed (1909) 29 S. Ct. 345, 212 U. S. 434, 53 L. Ed. 587; Gourley v. Countryman, 90 P. 427, 18 Okl. 220; Ross v. Stewart, 106 P. 870, 25 Okl. 611; Cox v. Garrett, 54 P. 546, 7 Okl. 375; Acers v. Snyder, 58 P. 780, 8 Okl. 659; (1896) Paine v. Foster, 53 P. 109, 9 Okl. 213, judgment affirmed (1899) 59 P. 252, 9 Okl. 257; Bertwell v. Haines, 63 P. 702, 10 Okl. 469; Cope v. Braden, 67 P. 475, 11 Okl. 291; Forney v. Dow, 73 P. 1101, 13 Okl. 258; McCalla v. Acker, 78 P. 223, 15 Okl. 52, judgment affirmed (1906) 26 S. Ct. 754, 200 U. S. 613, 50 L. Ed. 620; Best v. Frazier, 85 P. 1119, 16 Okl. 523; Reynolds v. Hill, 143 P. 1155, 43 Okl. 749; Greenameyer v. Coate, 88 P. 1054, 18 Okl. 160, judgment affirmed (1909) 29 S. Ct. 345, 212 U. S. 434, 53 L. Ed. 587; Howe v. Parker, 90 P. 15, 18 Okl. 282.

[30] King v. Thompson, 39 P. 466, 3 Okl. 644.

The United States Land Department's action in disposing of public domain will not be inquired into by courts, unless material error of law clearly appears or there has been fraud practiced upon or by the officer. Jones v. Fearnow, 53 Okl. 822, 156 P. 309, judgment affirmed Doepel v. Jones, 37 S. Ct. 645, 244 U. S. 305, 61 L. Ed. 1158.

The action of a town-site commission of the Creek Nation in granting the claim of one rival claimant, resulting in the issuance of a patent, and rejecting the claim of the other, will not be inquired into in the courts where it does not clearly appear that the commissioners committed some material error of law, or that misrepresentation and fraud were practiced upon them, or that they were chargeable with fraudulent practices. Fast v. Walcott, 38 Okl. 715, 134 P. 848.

In matters passed on by the land office, and which are open for review by the courts, the findings of fact made in the land department are final, and will not be reviewed in the courts, in the absence of fraud, imposition, or mistake. Cook v. McCord, 60 P. 497, 9 Okl. 200.

bringing of an action by the successful party to recover the possession of real estate.[31]

§ 242. —— Vested when—Exemption from taxation

"The jurisdiction ceded shall not vest until the United States shall have acquired the title of said lands by purchase, condemnation or otherwise; and so long as the said lands shall remain the property of the United States, when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all state, county and municipal taxation, assessment or other charges which may be levied or imposed under the authority of this state." [32]

§ 243. Equity

Equity, having once obtained jurisdiction, will retain it to administer complete relief, and to do so may determine purely legal rights;[33] but it need not render judgment on the claim by one

[31] Kirtley v. Dykes, 62 P. 808, 10 Okl. 16.

[32] Rev. Laws 1910, § 3192.

[33] Murray v. Speed, 54 Okl. 31, 153 P. 181.

Where equity has obtained jurisdiction, it will administer complete relief to avoid multiplicity of suits. Success Realty Co. v. Trowbridge, 50 Okl. 402, 150 P. 898; Ball v. White, 50 Okl. 429, 150 P. 901; Kansas City N. W. R. Co. v. Caton, 60 P. 544, 9 Kan. App. 272; Mathews v. Sniggs, 75 Okl. 108, 182 P. 703; Holmes v. Holt, 136 P. 246, 90 Kan. 774, judgment affirmed on rehearing 139 P. 1030, 92 Kan. 254, and affirmed on second rehearing 142 P. 369, 93 Kan. 7; Cook v. Warner, 140 P. 424, 41 Okl. 781.

The jurisdiction of equity having attached on a petition by the holder of warrants which had been merged into a funding proceeding to have set aside such proceeding, and to cancel such bonds on the ground that the town had failed to dispose of any of the bonds and retained all of them, refusing to refund the same as required by law, the court, having all the parties before it, will adjudicate on the rights of the parties connected with the subject-matter of the proceeding without remitting them to maintain a separate action at law upon the warrants merged in such funding proceeding. De Roberts v. Town of Cross, 101 P. 1114, 23 Okl. 888.

In an action by a vendor to recover the price of land sold under a contract providing that he should make a sufficient deed and furnish an abstract showing perfect title, the answer and cross-petition admitted possession under the contract, and also that plaintiff had failed to tender a sufficient deed, and the abstract showed an outstanding claim the holder of which had threatened to eject defendant, and had sued him in ejectment, also, the refusal of plaintiff to correct the defects in the title, and averred a willingness to pay the balance when the title was perfected and asked relief. Held, that a demurrer to the answer and cross-bill should be overruled, and cause retained, until the

of the parties, where no sufficient evidence has been introduced to determine the amount thereof.[34]

While one general partner could not maintain his action at law against his copartner, yet where such copartner sought equitable aid to obtain settlement of partnership affairs, and court by consent treated case as proceeding in equity, it had jurisdiction and should have ordered settlement.[35]

A court of equity of one state, having personal jurisdiction of a defendant, may compel performance of contracts to convey land in another state, or grant other relief arising out of contract, fraud, or trust. But an action may not be maintained in this state involving merely the title and possession to land in another state.[36]

A court of chancery has jurisdiction to construe a will, even though the doubt arising is a speculative one.[37]

§ 244. —— Foreclosure

Where in a proceeding to foreclose a mechanic's lien on school land, the title to which was in the government, no interest of the United States was sought to be taken, but only such interest as the person entitled to possession had in the land, the district court had jurisdiction.[38]

§ 245. Superior courts

Every superior "court shall have and exercise concurrent jurisdiction with the district court in all proceedings, causes or matters, and concurrent jurisdiction with the county court in all civil and criminal matters, except matters of probate. Provided, that in matters of probate appeals may be taken from the county court to either the district or superior court." [39]

This statute is valid.[40] It confers on superior courts jurisdiction

rights of the parties could be determined. Brown v. McCrie, 94 P. 144, 77 Kan. 230.

[34] Galbreath Gas Co. v. Lindsey, 62 Okl. 84, 161 P. 826.

[35] Baughman v. Hebard (Okl.) 166 P. 88.

[36] Caldwell v. Newton, 163 P. 163, 99 Kan. 846.

[37] Williams v. Williams, 14 P. 394, 73 Cal. 99.

[38] Jarrell v. Block, 92 P. 167, 19 Okl. 467.

[39] Sess. Laws 1915, p. 21, § 2.

[40] Sess. Laws 1909, c. 14, art. 7, creating a county superior court for each county, is not in violation of Const. art. 7, §§ 1, 10, relating to the jurisdiction of district courts, in that it confers on superior courts jurisdiction to con-

of appeal from judgment of county court in probate proceeding instituted to contest probate of will.[41]

The superior courts are not "county courts," as the term is used in section 19 of the Bill of Rights, even where exercising jurisdiction concurrent with county courts.[42]

§ 246. Supreme Court

"The appellate jurisdiction of the Supreme Court shall be coextensive with the state, and shall extend to all civil cases at law and in equity, and to all criminal cases until a Criminal Court of Appeals with exclusive appellate jurisdiction in criminal cases shall be established by law. The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all commissions and boards created by law. The Supreme Court shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition, and such other remedial writs, as may be provided by law, and to hear and determine the same; and the Supreme Court may exercise such other and further jurisdiction as may be conferred upon it by law. Each of the justices shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and make such writs returnable before himself, or before the Supreme Court, or before any district court, or judge thereof, in the state." [43]

This section of the Constitution, which grants to the Supreme Court general supervising control over inferior courts and all commissions and boards created by law, refers to inferior courts when exercising judicial functions, and when hearing and determining matters before said courts from which an appeal may be taken or to which writs of certiorari or other like writs may lie.[44]

§ 247. —— Appeals from county court

"Appeals and proceedings in error shall be taken from the judgments of county courts direct to the Supreme Court, in all cases

fer exclusive rights conferred by such statute on district courts. Burks v. Walker, 109 P. 544, 25 Okl. 353.

[41] In re Nichols' Will, 64 Okl. 241, 166 P. 1087.

[42] Antonelli v. State, 117 P. 654, 6 Okl. Cr. 157.

[43] Const. Okl. art. 7, § 2.

[44] Haddock v. Johnson, 80 Okl. 250, 194 P. 1077.

appealed from justices of the peace, and in all criminal cases of which the county court is vested with jurisdiction, and in all civil cases originally brought in the county court, in the same manner and by like proceedings as appeals are taken to the Supreme Court from the judgments of the district court." [45]

[45] Const. Okl. art. 7, § 15.

CHAPTER IV

VENUE

Sections
248–264. Article I.—Where actions brought.
265–273. Article II.—Change of venue.

ARTICLE I

WHERE ACTIONS BROUGHT

Sections
248. Where subject located.
249. Subject-matter.
250. Relating to real estate.
251. Land located in more than one county—Specific performance.
252. Where cause arose.
253. Residence of parties.
254. Domestic corporation—Insurance company.
255. Foreign corporations and nonresidents.
256. Process—Foreign corporations.
257. When charter revoked.
258. Actions against guaranty companies.
259. Actions against transportation or transmission companies.
260. Actions against turnpike companies.
261. Action against board of county commissioners.
262. Divorce and annulment.
263. Other actions.
264. Waiver of right.

§ 248. Where subject located

"Actions for the following causes must be brought in the county in which the subject of the action is situated, except as provided in the next section:

"First. For the recovery of real property, or of any estate, or interest therein, or the determination in any form of any such right or interest.

"Second. For the partition of real property.

"Third. For the sale of real property under a mortgage, lien, or other incumbrance or charge.

"Fourth. To quiet title, to establish a trust in, remove a cloud on, set aside a conveyance of, or to enforce or set aside an agreement to convey real property." [1]

[1] Rev. Laws 1910, § 4671.

§ 249. Subject-matter

In an action for damages by an alleged conspiracy of defendants to deny plaintiff's right to use certain pasture, where no relief is asked as to the real estate, the damages are only to personal property, and the action is transitory.[2]

Payment of usury and demand for its return creates right of action for its recovery which may be maintained in the county in which payment was made.[3]

Where a liability accrues on a supersedeas bond given in a cause tried in one county, action on the bond may be maintained in another county, though the company and its sureties reside and are summoned in other counties.[4]

An act of injunction to prevent the closing of an undergrade crossing of a railroad operates in personam, and is not one of those which must be brought in the county in which the subject of the action is situated.[5]

Where a party is a resident of the state, and owns property in some other county than that of his residence, and the action is a personal one, suit to reach his property can only be brought in the county where he resides, or where he may be summoned.[6]

§ 250. —— Relating to real estate

An action for the price of land and to enforce a vendor's lien must be brought in the county where the land lies,[7] as must an action to remove cloud from title,[8] and an action for partition;[9] but

[2] Dunn & Gilliam v. District Court of Carter County, 128 P. 114, 35 Okl. 38.
[3] Thorne v. Milliken, 57 Okl. 735, 157 P. 914.
[4] Oklahoma Fire Ins. Co. v. Kimple, 57 Okl. 398, 156 P. 300.
[5] Chicago, R. I. & P. Ry. Co. v. Wynkoop, 85 P. 595, 73 Kan. 590.
[6] Barton v. Hanauer, 44 P. 1007, 4 Kan. App. 531.
[7] Ames v. Milam, 53 Okl. 739, 157 P. 941; Newcomer v. Sheppard, 51 Okl. 335, 152 P. 66; Whitehead v. Jefferson, 51 Okl. 42, 151 P. 681.
[8] A petition construed and held that the object of the action was to destroy a pretended exchange and restore plaintiff and his land to that freedom from cloud existing before the transaction, and that hence, under Code Civ. Proc.

[9] In an action to determine the interest of the parties in several tracts and for partition, the court is without jurisdiction, so far as the action affects land in another county, of infant defendants having no interest in the land in the county in which suit is brought, and not residing therein; and no consent of theirs could give jurisdiction. Martin v. Battey, 125 P. 88, 87 Kan. 582, Ann. Cas. 1914A, 440.

the real estate clause of the statute does not apply to actions by which defendant's conduct is sought to be controlled, though title may be affected thereby,[10] nor does it apply to an action for damages to real estate.[11]

An action by legal representative of an insane person's estate to reclaim trust fund diverted by a former guardian and invested in land, and to establish trust against land, is properly brought in county where land is situated.[12]

An action to foreclose a mortgage, where plaintiff alleged that the note and mortgage were wrongfully in possession of another, is a local action, though plaintiff prays in his petition that such wrongful holder may be required to bring such note and mortgage into court.[13]

Where an action, brought in a county other than that in which the land is located, to enforce a vendor's lien, is treated as a personal action and a judgment in personam only is rendered, it is too late thereafter to urge that the action was one in rem, and that the court had no jurisdiction.[14]

§ 251. —— Land located in more than one county—Specific performance

"If real property, the subject of an action, be an entire tract, and situated in two or more counties, or if it consist of separate tracts, situated in two or more counties, the action may be brought in any county in which any tract, or part thereof, is situated, unless it be an action to recover possession thereof, and if the property be

§ 48 (Gen. St. 1909, § 5641), the action was properly brought where the land was situated. Randall v. Ross, 147 P. 72, 94 Kan. 708.

Plaintiff sued in A. county to quiet title to land in that county against certain defendants claiming interests in that land, and also to lands in B. county against defendants claiming no interest in the A. county land. Held, that the court had no jurisdiction over the controversy as to the land in B. county, under Code Civ. Proc. § 46 (Gen. St. 1901, § 4476). Jones v. Redemption & Investment Co., 99 P. 1129, 79 Kan. 477.

[10] Zane v. Vawter, 172 P. 37, 102 Kan. 887.

[11] An action to recover damages to realty, improvements, and crops from fire held not an action concerning real property, the venue of which is fixed by Code Civ. Proc. § 48 (Gen. St. 1909, § 5641), in the county where the property is situated. Hill v. Missouri Pac. Ry. Co., 146 P. 351, 94 Kan. 254.

[12] Clingman v. Hill, 104 Kan. 145, 178 P. 243.

[13] Mack v. Austin, 72 P. 551, 67 Kan. 36.

[14] Newcomer v. Sheppard, 51 Okl. 335, 152 P. 66.

an entire tract, situated in two or more counties, an action to recover possession thereof may be brought in either of such counties; but if it consists of separate tracts, in different counties, the possession of such tracts must be recovered by separate actions brought in the counties where such tracts are situated. An action to compel the specific performance of a contract to sell real estate may be brought in the county where the land lies or where the defendants or any of them reside or may be summoned." [15]

An action to compel defendant to reconvey land claimed by him under a deed alleged to have been procured through his fraud is transitory and not local, and may be brought in any county where personal service can be had upon him.[16]

§ 252. Where cause arose

"Actions for the following causes must be brought in the county where the cause, or some part thereof, arose:

"First. An action for the recovery of a fine, forfeiture or penalty imposed by statute, except when imposed for an offense committed on a river or other stream of water, road or other place which is the boundary of two or more counties, the cause of action shall be deemed to have arisen in each of said counties, and may be brought in any county bordering on such river, water-course, road or other place, and opposite to the place where the offense was committed.

"Second. An action against a public officer for an act done by him in virtue, or under color of his office, or for neglect of his official duties.

"Third. An action on the official bond or undertaking of a public officer." [17]

§ 253. Residence of parties

A civil action seeking to subject the property of a resident to the payment of a debt must be commenced in the county where de-

[15] Rev. Laws 1910, § 4672.

Where in Code Civ. Proc. § 51 (Gen. St. 1909, § 5644), relating to venue, it is provided that certain actions "must" and others "may" be brought in certain counties, and that all others must be brought in the county of defendant's residence or where he may be summoned, actions in relation to which the term "may" is used are not thereby rendered local and may be brought in any county in which defendant is summoned. Henry v. Missouri, K. & T. Ry. Co., 142 P. 972, 92 Kan. 1017; Id., 142 P. 973, 92 Kan. 1020.

[16] Zane v. Vawter, 172 P. 37, 102 Kan. 887.

[17] Rev. Laws 1910, § 4673.

fendants or one of them resides or may be summoned;[18] but a cause of action must exist against the local defendant.[19]

§ 254. Domestic corporation—Insurance company

"An action, other than one of those mentioned in the first three sections of this article, against a corporation created by the laws of this state, may be brought in the county in which it is situated, or has its principal office or place of business, or in which any of

[18] Friedman v. First Nat. Bank, 39 Okl. 486, 135 P. 1069, 49 L. R. A. (N. S.) 548; Rullman v. Hulse, 7 P. 210, 33 Kan. 670.

Where the maker of a nonnegotiable note is sued in a county in which the indorser resides, but in which the maker does not reside, and where the indorser makes no defense, but permits judgment by default, it is not error to overrule motion by the maker to set aside the service on him, because he is not a resident of the county, and was not served therein. Steele v. Hudson, 30 Okl. 518, 120 P. 616.

[19] Makemson v. Edwards, 101 Kan. 269, 166 P. 508.

A defendant, served in a county other than the one in which the action is brought, will not be held bound thereby, if the resident defendant was joined to obtain jurisdiction over such nonresident defendant, and not in good faith to recover a judgment against the resident defendant. Hawkins v. Brown, 97 P. 479, 78 Kan. 284. The rule that a defendant, served in a county other than the one in which the action is brought, will not be bound thereby, if the resident defendant was joined to obtain jurisdiction of such nonresident defendant, and not in good faith to recover a judgment against the resident defendant, will not be applied against an innocent party, who in good faith, and in the honest belief that his cause is just, and that he has a right to recover against the resident defendant, is defeated by him, after a full trial, by a plea of the statute of limitations. Id.

In action for money deposited by plaintiff to secure his performance of a contract, brought on ground of its conversion by defendant bank and a promoter, the latter, who had joined the bank in the scheme to turn over money to another, though he had no interest in money, was a proper party defendant, so that suit was properly brought in county of his residence. Oklahoma State Bank of Cushing v. Buzzard (Okl.) 175 P. 750.

Where an action was brought against nonresidents and their property attached, and also against a resident of another county, and there was no evidence to sustain a cause of action against the nonresidents, the court had no jurisdiction over the resident. Hembrow v. Winsor, 145 P. 837, 94 Kan. 1.

A. and B., joint makers of a promissory note, were sued on the same before it was due in the county of A.'s residence, and a summons issued to B.'s county, and his property there attached on the ground of anticipated fraudulent transfer, but no attachment was issued against A., and no ground therefor existed. Held that, as the action was wrongfully begun against A., it could not be begun against B. in A.'s county, and therefore B. was entitled to have the attachment dissolved. Rullman v. Hulse, 5 P. 176, 32 Kan. 598, rehearing denied 7 P. 210, 33 Kan. 670.

In an action against one party on a lease and on a separate writing where-

the principal officers thereof may reside, or be summoned, or in the county where the cause of action or some part thereof arose." [20]

A special appearance motion of a corporation defendant, going to the jurisdiction of the district court of one county, after service on a proper individual defendant of another county, and a service on the corporation in the county of its domicile, was properly overruled.[21]

The provision that an action against a domestic company may be brought in the county where the cause of action or some part thereof arose applies to all kinds of actions.[22]

§ 255. Foreign corporations and nonresidents

"In addition to the other counties in which an action may be brought against a nonresident of this state, or a foreign corporation, such action may be brought in any county in which there may be property of, or debts owing to, such defendant, or where such defendant may be found; if such defendant be a foreign insurance company, the action may be brought in any county where such cause of action, or any part thereof, arose, or where the plaintiff resides, or where such company has an agent." [23]

"Any foreign corporation, doing business in the state of Oklahoma, and any person now or hereafter having any cause of action against such corporation, arising on contract, tort, or otherwise, may file suit in any county in the state of Oklahoma where the plaintiff resides or where said corporation has its principal place of business, or has property, or in any county where said corporation has an agent appointed upon whom service of summons or other process may be had." [24]

in another guaranties the rent, the service of summons upon one defendant in the county where the action was brought does not authorize service of summons upon the other defendant in another county. Marshall v. Saline River Land & Mineral Co., 89 P. 905, 75 Kan. 445.

[20] Rev. Laws 1910, § 4674, as amended by Sess. Laws 1913, p. 133, § 1.

[21] Oklahoma State Bank of Cushing v. Buzzard (Okl.) 175 P. 750.

[22] Oklahoma Fire Ins. Co. v. Kimple, 57 Okl. 398, 156 P. 300.

[23] Rev. Laws 1910, § 4677.

An action against a nonresident insurance company is properly brought in the county of the plaintiff's residence. Haynes v. City Nat. Bank of Lawton, 121 P. 182, 30 Okl. 614.

[24] Sess. Laws 1910–11, p. 46, § 1.

Statute is valid. Prairie Oil & Gas Co. v. District Court of Grady County (Okl.) 174 P. 1056.

§ 256. —— Process—Foreign corporations

"Any foreign corporation, doing business in the state of Oklahoma, having failed either to appoint an agent upon whom service of summons or other process may be had, or failed to file in the office of the secretary of state a duly authenticated copy of its articles of incorporation or charter, or having failed to pay the license fee as required by law, then in the event of said foreign corporation having failed to comply with any of the provisions of the law as above referred to, any person now or hereafter having any cause of action against any foreign corporation may file suit against said foreign corporation in any county in the state and service of summons or any process upon the secretary of state shall be sufficient to give jurisdiction of the person to any court in this state having jurisdiction of the subject-matter." [25]

§ 257. —— When charter revoked

"Any foreign corporation having complied with the law by appointing an agent upon whom service of summons or other process may be had, or by filing an authenticated copy of its article of incorporation or charter with the secretary of state, or having paid the license fee as required by law, and heretofore the charter of said corporation having been revoked by the secretary of state or other proper officer, or if the charter of any foreign corporation should hereafter be revoked by the secretary of state or other proper officer, then any person having now or hereafter any cause of action against such foreign corporation, may file suit against said foreign corporation in any county in the state of Oklahoma and service of summons or other process upon the secretary of state shall be sufficient to give jurisdiction of the person to any court in this state having jurisdiction of the subject-matter, and under provisions of this act jurisdiction is hereby conferred upon any court having jurisdiction of the subject-matter, sitting in any county in this state, whether it be in the county where the secretary of state is served or resides, or elsewhere in said state." [26]

[25] Sess. Laws 1910–11, p. 47, § 2.

A corporation having its principal place of business in Texas, but an office in Roff, Okl., where it did some business, held not entitled to have the case transferred from Ada to Roff under Sess. Laws 1910–11, c. 32, § 2. Roff Oil & Cotton Co. v. King, 46 Okl. 31, 148 P. 90.

[26] Sess. Laws 1910–11, p. 47, § 3.

§ 258. Actions against guaranty companies

Any surety company doing business under the provisions of article 10, c. 15, Rev. Laws 1910, "may be sued in respect thereof in any court of the United States or the state of Oklahoma which has jurisdiction of actions or suits upon which such recognizances, stipulations, bond or undertaking was made or guaranteed. And for the purpose of this article such recognizance, stipulation, bond or undertaking shall be treated as made or guaranteed in the county in which the office is located to which it is returnable, or in which it is filed, or in the county in which the principal of such recognizance, stipulation, bond or undertaking resided when it was made or guaranteed." [27]

§ 259. Actions against transportation or transmission companies

"Actions may be commenced against any transportation or transmission company in the county where any person resides upon whom service of summons is authorized to be made, irrespective of the order in which such persons are named in this chapter, and irrespective of the residence of any superior officer or authorized person upon whom service of summons may be had; or in the county where the cause of action, or some part thereof, may have accrued; or, in any county through which or into which the lines of road or any part of the structure of such company may be, or passes; and the plaintiff may elect in which county he will bring the action." [28]

Where corporations in adjoining states operate a continuous line of railroad jointly by the same officers and employés, an injured employé may sue in the courts of either state.[29]

[27] Rev. Laws 1910, § 1348.

[28] Rev. Laws 1910, § 4675.

Under Const. art. 9, § 43, suit may be brought against a foreign corporation operating a railway in the state in the county where the plaintiff resides, though the cause of action did not arise there, and defendant has no agent there and no part of its line of railway. Atchison, T. & S. F. Ry. Co. v. Lambert, 123 P. 428, 32 Okl. 665. Const. art. 9, § 43, as to venue of actions against foreign corporations, relates to public service corporations as well as private corporations. Id. Comp. Laws, § 5584, providing the venue of actions against transportation companies, does not limit the right of a plaintiff to sue such a company, when a foreign corporation in the county of his residence, pursuant to Const. art. 9, § 43. Id.

[29] Wichita Falls & N. W. Ry. Co. v. Puckett, 53 Okl. 463, 157 P. 112.

§ 260. Actions against turnpike companies

"An action, other than one of those mentioned in the first three sections of this article, against a turnpike road company, may be brought in any county in which any part of such turnpike road or roads lie." [30]

§ 261. Action against board of county commissioners

"Any person who has been aggrieved by any act, rule or regulation of said board shall have his right of action to have such issue tried in the district court of the county in which some member of the board shall reside." [31]

§ 262. Divorce and annulment

"An action for divorce or annulment of marriage may be brought in the county of which the plaintiff is an actual resident at the time of filing the petition." [32]

§ 263. Other actions

"Every other action must be brought in the county in which the defendant or some one of the defendants resides or may be summoned; except actions against makers of notes, claims or other indebtedness which have been assigned, sold or transferred by or from the original payee or obligee, which actions against such original maker of such notes, claims or indebtedness can only be brought in the county in which the said maker of such note, claim or indebtedness or some one of the original makers of such note, claim or indebtedness resides: Provided, however, this section shall not in any way change or limit section 4671 of the Revised Laws of Oklahoma, 1910." [33]

§ 264. Waiver of right

Where defendant demurs to the petition without objecting to the jurisdiction, he waives his right to have the case filed and tried in the county of his residence.[34]

[30] Rev. Laws 1910, § 4676.
[31] Rev. Laws 1910, § 6913.
[32] Rev. Laws 1910, § 4678, as amended by Sess. Laws 1915, p. 199, § 1.
[33] Rev. Laws 1910, § 4679, as amended by Sess. Laws 1915, p. 104, § 1.
[34] Lindley v. Kelly, 47 Okl. 328, 147 P. 1015.
Objection that an action should have been brought in the county where the cause of action arose is waived by filing demurrers presenting other grounds, together with the objection to the venue. Hume v. Cragin, 61 Okl. 219, 160 P. 621.

ARTICLE II

CHANGE OF VENUE

Sections

265. Change of venue.
266. Discretion.
267. Grounds—Disqualification of judge.
268. Local prejudice.
269. Application.
270. Hearing and order.
271. Waiver.
272. Proceedings after change.
273. Form.

§ 265. Change of venue

"In all cases in which it is made to appear to the court that a fair and impartial trial cannot be had in the county where the suit is pending, the court may, on application of either party, change the place of trial to some county where such objections do not exist." [35]

§ 266. Discretion

The statute is not mandatory, and does not require grant of a change on any showing, but the court is vested with a sound discretion,[36] and a conclusion or judgment of the court regarding an application for a change of venue that is clearly against the logic and effect of the facts and circumstances presented in support of the application, or against the reasonable, probable, and natural deductions to be drawn from the facts and circumstances is an abuse of the discretion of the court.[37]

§ 267. Grounds—Disqualification of judge

The statutes relative to a change of venue because of the bias or prejudice of the judge, are not mandatory and do not require a change upon any showing, but the court is vested with a judicial discretion in granting or refusing the same.[38]

[35] Rev. Laws 1910, § 4680.

[36] Horton v. Haines, 102 P. 121, 23 Okl. 878; Hanson v. Hanson, 122 P. 100, 86 Kan. 622.

[37] Richardson v. Augustine, 49 P. 930, 5 Okl. 667.

Under Comp. Laws 1909, §§ 542-544, the court has discretion to transfer a civil action from one county to another. Simpkins v. Parsons, 50 Okl. 786, 151 P. 588.

[38] State v. Brown, 103 P. 762, 24 Okl. 433.

An apprehension of a party that a judge is prejudiced against him is not enough to require a change of venue, but it must satisfactorily appear that prejudice in fact exists.[39]

An affidavit alleging prejudice in the county, that the judge was biased, and that the applicant had a suit pending against the judge, was insufficient to compel a change of venue.[40]

Where it appears that the judge is interested in the subject-matter or is otherwise disqualified, a change of venue is not a matter of discretion of the court, but a right in the party applying therefor.[41]

It is error not to grant a change of a cause, in which, on a former trial, the presiding judge had been a material witness,[42] or of counsel in the matter.[43]

§ 268. Local prejudice

A change of venue should be granted, where it appears that defendant cannot have a fair trial by reason of local prejudice.[44]

A party in a civil suit, not triable by a jury, is not entitled to a change of venue on account of local prejudice of the citizens.[45]

[39] In re Smith, 85 P. 584, 73 Kan. 743.

A showing that a judge is a particular friend of the plaintiff, and might be unconsciously prejudiced against the defendant, is not sufficient to authorize a change of venue. Isenhart v. Hazen, 63 P. 451, 10 Kan. App. 577.

[40] Hanson v. Kendt, 146 P. 1190, 94 Kan. 310.

[41] Jones v. American Cent. Ins. Co., 109 P. 1077, 83 Kan. 44.

[42] Burlington Ins. Co. v. McLeod, 19 P. 354, 40 Kan. 54.

It is proper to grant a change of venue upon proof, by affidavit, undisputed, that the judge is a material witness for the party moving for such change, and that his evidence is material. Spencer v. Iowa Mortg. Co., 50 P. 1094, 6 Kan. App. 378.

[43] City of Leavenworth v. Green River Asphalt Co., 165 P. 824, 101 Kan. 82.

[44] By the showing made by defendants in support of an application for a change of venue, it appeared that the action was one of 30 brought to charge defendants with liability to depositors of a bank located in the county, by failure of which some 200 depositors had suffered loss; that 11 of the actions had been tried in the county in which some 100 persons had been called as jurors and a large number as witnesses; that the failure created great excitement throughout the county, and had been investigated by two grand juries; and that defendants were then under indictment, charged with criminal conduct in connection therewith. Held, that a denial of the motion was an abuse of discretion. Richardson v. Augustine, 49 P. 930, 5 Okl. 667.

[45] Dean v. Stone, 35 P. 578, 2 Okl. 13.

§ 269. Application

An application for change of venue may be presented at any time before trial.[46]

Where issues of fact have not been made up, an application for a change of venue on the sole ground that the district judge will necessarily be a material witness for plaintiff, is properly overruled, as premature.[47]

The application must state the facts on which it is based, and not conclusions.[48]

Where a party to a civil suit applies for a change of venue, and the affidavit alleges that the judge is a material witness in his behalf, that he intends to procure his presence as such if a change is granted, the granting a change by the judge, based on such affidavit and his own personal knowledge, is not error.[49]

An affidavit containing a naked declaration and conclusion that the judge is prejudiced is insufficient.[50]

[46] Maharry v. Maharry, 47 P. 1051, 5 Okl. 371.

The regular judge of the district court having been of counsel in several cases, and therefore disqualified to sit in the trial thereof, on motion of a member of the bar a pro tem. judge was elected. Neither counsel nor client in this case appear by the record to have participated in such election, or to have been present or consented thereto. Held, that an application for a change of the place of trial to another district was not too late when made at the time the case was called for trial by the pro tem. judge. Hegwer v. Kiff, 3 P. 303, 31 Kan. 636.

Where the judge of the district court has been of counsel in a case, a party has the right to demand a change to another district at any time before the trial, if the issues have already been made up, and up to the time of judgment where no issues have been made up; and in such case he may demand a change to have the issues made up, and get a trial thereon. Commissioners of Sumner County v. Wellington Tp., 17 P. 787, 39 Kan. 137.

[47] Carver v. Greason, 101 Kan. 639, 168 P. 869.

[48] Maharry v. Maharry, 47 P. 1051, 5 Okl. 371; Horton v. Haines, 102 P. 121, 23 Okl. 878.

The facts and circumstances by which it shall be made to appear to the court that a fair and impartial trial cannot be had must be shown in the affidavits in support of the application. Richardson v. Augustine, 49 P. 930, 5 Okl. 667.

[49] Gray v. Crockett, 12 P. 129, 35 Kan. 686, denying rehearing, 10 P. 452, 35 Kan. 66.

[50] Griggs v. Corson, 81 P. 471, 71 Kan. 884.

When based solely on the affidavit of defendant's agent that it was his belief that defendant could not have a fair and impartial trial, it is properly denied.[51]

§ 270. Hearing and order

A motion for change of venue on the ground that the judge is prejudiced is to be determined by the judge, in view of his own knowledge.[52]

It is not error for the trial court to postpone its determination of an application for a change of venue until after the jury have been impaneled for the trial of the causes, but in determining whether a fair trial can be had the court cannot take into consideration the testimony of the jurors upon their voir dire examination.[53]

After allowing an application for a change of venue, the court may, at the same term, and before the papers or any transcript of them are transmitted, vacate the order for the purpose of allowing the case to be tried before a judge pro tem.[54]

It is not sufficient ground for refusal of an application for a change of venue in a suit for divorce that the applicant has failed to comply with an order of the court to pay alimony pending the suit.[55]

[51] McCormick Harvesting Mach. Co. v. Hayes, 53 P. 70, 7 Kan. App. 141.

When an affidavit for a change of venue is general in its terms, and the judge has personal knowledge that he is disqualified to sit, a change of venue ordered by him upon the affidavit, and his own personal knowledge that he is so disqualified, is not erroneous. Gray v. Crockett, 10 P. 452, 35 Kan. 66, rehearing denied, 12 P. 129, 35 Kan. 686. Where a party makes an application for a change of venue, and files an affidavit in support thereof, upon the ground that he is advised by his attorney that the judge is a material witness in his behalf, that he believes such advice to be true, and desires the evidence of the judge at the trial, and intends to procure the same if a change of venue is granted, and the court upon such application, affidavit, and its own personal knowledge, transfers the case to another district for trial, the order is not erroneous; but if the court, upon such affidavit, so general in its terms, had overruled the application, the Supreme Court would not disturb the ruling. Id.

[52] Miller v. Kerr, 146 P. 1159, 94 Kan. 545.

[53] Richardson v. Augustine, 49 P. 930, 5 Okl. 667.

[54] Mudge v. Hull, 43 P. 242, 56 Kan. 314.

An order transferring a civil action from one county to another, may be vacated during the term at which it was made, if the court to which the cause is transferred has not acquired jurisdiction. Simpkins v. Parsons, 50 Okl. 786, 151 P. 588. If a court vacates an order transferring the cause to

[55] Maharry v. Maharry, 47 P. 1051, 5 Okl. 371.

§ 271. Waiver

Where a party consents to a case being sent to a referee after his motion for a change of venue has been overruled, he waives the error in the ruling on the motion.[56]

Where an application for change of venue for disqualification of the district judge is erroneously overruled, applicant does not waive the error by neglecting to object to going to trial when the case is reached at the next succeeding term of court, nor does a stipulation that a case shall be submitted to the court and jury that tried a companion case upon the same evidence and instructions, verdict to be returned and judgment rendered the same as if all the steps of a trial had been taken, waive an error previously committed in denying a change of venue for disqualification of the judge.[57] The right to a change of venue may be waived by failure to claim and urge same.[58]

§ 272. Proceedings after change

Where a cause is transferred on change of venue, the court does not acquire jurisdiction until the papers and records are received and entered upon its docket;[59] but the court may proceed to the

another court at the same term before the papers are transferred and docketed, it retains jurisdiction to render judgment. Id.

[56] Isenhart v. Hazen, 63 P. 451, 10 Kan. App. 577.

[57] Jones v. Williamsburg City Fire Ins. Co., 112 P. 826, 83 Kan. 682, judgment affirmed on rehearing 116 P. 484, 85 Kan. 235.

[58] On an application for a change of venue, the files of the case were transmitted to the district court of another county, where both parties appeared and proceeded to trial without objection. After judgment had been rendered, and the same reversed on a proceeding in error, objection to the jurisdiction was made because no formal order changing the venue had been made and entered. Held, that any irregularity in transferring the case had been waived. City of Garden City v. Heller, 60 P. 1060, 61 Kan. 767.

A motion made by defendant for a change of venue on the grounds of the disqualification of the regular judge and local prejudice was overruled as to the latter ground. The judge of another district was called in, who presided at a trial, resulting in a disagreement of the jury. Thereafter a pro tem. judge was chosen, and a second trial had. There was no objection from the defendant at either trial to the jurisdiction of the court, or the authority of the judge to sit. Held, that the claim of right to a change of venue was waived. Missouri Pac. Ry. Co. v. Preston, 63 P. 444, judgment affirmed 66 P. 1050, 63 Kan. 819.

[59] Simpkins v. Parsons, 50 Okl. 786, 151 P. 588.

trial of the cause on a true transcript of the proceedings, and without the original files.[60]

A court to which the cause is transferred acquires jurisdiction coextensive with that of the court from which the venue was removed, and can render any judgment which might have been rendered by the other court.[61] It has jurisdiction to determine the validity of the costs taxed in both counties,[62] and on proper showing may correct the records transferred.[63]

§ 273. Form

AFFIDAVIT FOR CHANGE OF VENUE

(Caption.)

State of Oklahoma, } ss.:
County of ———. }

A. B., of lawful age, being first duly sworn, upon oath, says: That he is the defendant above named; that he is a resident of said ——— county; that he believes that he cannot have a fair and impartial trial of his said cause in said county of ———, for the reason that there exists so great a prejudice against him therein (or state other reasons which exist); that the belief as to such prejudice is based upon the following facts and circumstances, to wit: (Setting same forth fully.)

Wherefore said defendant prays that he may be granted a change of venue of this cause to ——— county, or to some other county where such prejudice does not exist.

———, Attorneys for Defendant.

[60] Wichita & W. R. Co. v. Kuhn, 16 P. 75, 38 Kan. 104, judgment reversed on rehearing 17 P. 322, 38 Kan. 675.

[61] Hazen v. Webb, 68 P. 1096, 65 Kan. 38, 93 Am. St. Rep. 276.

[62] Asbell v. Aldrich, 147 P. 1126, 95 Kan. 313.

[63] Where an execution on a judgment of the district court is enjoined in the same action, and, pending a motion to dissolve, all the proceedings are transferred by change of venue to the district court of another county, the court to which the cause is transferred can on satisfactory proof direct that a clerical omission in the entry of judgment be corrected. United Zinc & Chemical Co. v. Morrison, 92 P. 1114, 76 Kan. 799. A clerical error in the entry of a judgment may be corrected by certified copy of the journal entry of the trial, certified copies of judgment docket showing an abstract of the judgment entered by the clerk, and copies of the memoranda of the trial from the judge's trial docket. Id.

CHAPTER V

REMEDIES AND RIGHTS

Sections
274–295. Article I.—In general.
296–298. Article II.—Election of remedies.

ARTICLE I

IN GENERAL

Sections
274. Remedies.
275. Cumulative remedy.
276. Actions and special proceedings.
277. Distinctions abolished.
278. Determination of character.
279. Common-law actions.
280. Tort and contract.
281. Illegal transactions.
282. Injury without liability.
283. Tenders.
284. Right of action—Warrantee—Costs and expenses.
285. Action on surveyor's bond.
286. Surety against principal.
287. Money received.
288. Conditions precedent—Warranty.
289. Death pending action.
290. Claim against estate.
291. Usury.
292. Claim against municipality.
293. Offer—Demand—Notice.
294. Taxes.
295. Insurance.

§ 274. Remedies

"Remedies in the courts of justice are divided into: First. Actions. Second. Special proceedings." [1]

§ 275. Cumulative remedy

A cumulative remedy is one created by statute in addition to one which still remains in force, and when a statute gives a new remedy, and contains no negative, express or implied, of the old

[1] Rev. Laws 1910, § 4643.

remedy, the new one provided is cumulative and the party may elect between the two.[2]

§ 276. Actions and special proceedings

"An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." [3]

"Every other remedy is a special proceeding." [4]

"Actions are of two kinds: First, civil; second, criminal." [5]

"A criminal action is one prosecuted by the State as a party, against a person charged with a public offense, for the punishment thereof." [6]

"Every other is a civil action." [7]

"Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other." [8]

§ 277. Distinctions abolished

"The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and in their place there shall be, hereafter, but one form of action, which shall be called a civil action." [9]

However, the essential and inherent principles of legal and equitable rights and remedies remain as before; the statute not being intended to alter or directly affect the primary rights and liabilities created or recognized either in law or equity.[10]

[2] Bowles v. Neely, 115 P. 344, 28 Okl. 556.

[3] Rev. Laws 1910, § 4644.

[4] Rev. Laws 1910, § 4645.

[5] Rev. Laws 1910, § 4646.

[6] Rev. Laws 1910, § 4647.

[7] Rev. Laws 1910, § 4648.

[8] Rev. Laws 1910, § 4649.

Only three kinds of actions may be had in Oklahoma, namely, a civil action, criminal action, and special proceeding; the distinction between chancery and law jurisdiction never having obtained. State v. Huston, 113 P. 190, 27 Okl. 606, 34 L. R. A. (N. S.) 380.

[9] Rev. Laws 1910, § 4650.

[10] Mathews v. Sniggs, 75 Okl. 108, 182 P. 703.

Though the Legislature has abolished the distinction between actions at law and suits in equity, yet it was not thereby intended to change the nature

The common-law rules of pleading, and all distinctions in form between actions at law and suits in equity, are abolished, leaving only a civil action, consisting of a statement of the facts, in plain language, the redress sought, and the party liable.[11] It is error to compel plaintiff to elect whether he will proceed in equity or at law.[12]

§ 278. Determination of character

The character of an action is to be determined by the nature of issue made by the pleadings and the rights and remedies of the parties, and not alone by the form in which the action was brought or by the prayer for relief, which, in that respect, is no material part of the pleading. Strictly speaking, "remedy" given is no part of the action, but is the result thereof, the object for which the action is presented, the end to which all the litigation is directed.[13]

§ 279. Common-law actions

Causes of action that existed under the common-law forms, which have not been expressly abolished, still exist under the name of "civil actions"; and a plaintiff, under the statute, must allege and prove every fact that he was required to allege and prove at common law.[14]

"Real actions," included in common-law actions, were those brought for the specific recovery of lands; some being founded on the seizure or possession, and some on the property or right. "Personal actions," included in common-law actions, were those begun

of the remedies generally obtaining where courts of law and chancery are separated. Olson v. Thompson, 48 P. 184, 6 Okl. 74.

While the distinction between law and equity is abolished, equitable relief may be awarded under proper allegations by means of an equitable defense to defeat plaintiff's legal cause of action. Farmers' & Merchants' Nat. Bank v. Hoyt, 120 P. 264, 29 Okl. 772.

Notwithstanding the provisions of the Civil Code abolishing all distinctions between actions at law and suits in equity, and the common-law forms of actions and suits, the rules of law which control the manner of enforcing a cause of action depend on the nature of the cause sought to be enforced, and until such nature is determined the rules of law governing the case are impossible of ascertainment. Carbondale Inv. Co. v. Burdick, 72 P. 781, 67 Kan. 329.

11 St. Louis & S. F. R. Co. v. Yount, 30 Okl. 371, 120 P. 627.

12 Brawley v. Smith, 54 P. 804, 8 Kan. App. 411.

13 Mathews v. Sniggs, 75 Okl. 108, 182 P. 703.

14 Phelps, Dodge & Palmer Co. v. Halsell, 65 P. 340, 11 Okl. 1.

for the specific recovery of goods and chattels, or for damages or other redress for breach of contract or other injury of whatever description; the specific recovery of lands only excepted. "Mixed actions," included in common-law actions, were such as appertained in some degree to both real and personal actions, and therefore reducible to neither of them; being brought both for the specific recovery of lands, and for damages for injuries to such property.[15]

Where a cause of action which does not exist at common law is created by the statute of another state or territory, such cause of action, when presented to the courts, will be held to consist, not merely of the right given, but also of all the conditions and limitations attached thereto by the statute of the place where it was created.[16]

§ 280. Tort and contract

The statute does not abolish the distinction between an action for tort and an action on contract.[17] Whether an action is ex contractu or ex delicto is to be determined by the pleadings.[18]

[15] Mathews v. Sniggs, 75 Okl. 108, 182 P. 703.

[16] Swisher v. Atchison, T. & S. F. Ry. Co., 90 P. 812, 76 Kan. 97.

[17] Robinson v. Oklahoma Fire Ins. Co., 55 Okl. 52, 155 P. 202.

[18] Union Pac. Ry. Co. v. Shook, 44 P. 685, 3 Kan. App. 710; Atchison, T. & S. F. R. Co. v. Long, 47 P. 993, 5 Kan. App. 644.

Actions ex delicto.—Petition claiming title to purchase money for land sold by plaintiff's agent and deposited in defendant's bank held to show that action was for relief on ground of fraud. Fix v. Rose, 64 Okl. 113, 166 P. 145.

A passenger's action for injuries from collision with a switch engine held an action sounding in tort. Martin v. Chicago, R. I. & P. Ry. Co., 46 Okl. 169, 148 P. 711.

Where the effects of a passenger which are damaged by the negligence of the carrier are accepted and retained by the passenger, an action for the damages should be in tort, and not on account. Atchison, T. & S. F. R. Co. v. Wilkinson, 39 P. 1043, 55 Kan. 83.

Action to recover a part of the consideration of a contract alleged to have been paid by reason of the fraudulent representations of defendants as to the amount due thereon is an action for relief on the ground of fraud, and not an action on the contract. Ottawa Condensing Co. v. Dawkins, 120 P. 356, 86 Kan. 312.

A petition alleging that defendant railroad company, by its agents and servants, after having sold plaintiff a ticket, refused to allow him to remain on the train without payment of additional fare, and wrongfully, forcibly, and unlawfully ejected him, to his damage in a certain sum, declares on a cause of action ex delicto. Atchison, T. & S. F. R. Co. v. Long, 47 P. 993, 5 Kan. App. 644.

Actions ex contractu.—An action by a grand lodge against a bank to recov-

Where the relation between the parties to an action has been established by contract, express or implied, if the law imposes certain duties because of the existence of the relation, a violation of the contract obligations may be waived and an action in tort brought for any violation of such duties.[19]

Where one person wrongs another for his own benefit, the law may imply a contract by the wrongdoer to pay to the party injured the full value of the benefits resulting.[20]

A person injured from a neglected duty imposed by law, by rea-

er the amount of an overdraft by a defaulting treasurer of the grand lodge is an action on implied contract and not in tort for relief on the ground of fraud. Washbon v. Linscott State Bank, 125 P. 17, 87 Kan. 698.

A petition stating a contract of carriage and charging a violation of duty, in an action against a carrier, states a cause of action in tort rather than contract. Ft. Smith & W. R. Co. v. Ford, 126 P. 745, 34 Okl. 575, 41 L. R. A. (N. S.) 745. Where an action against a carrier for damages sounds in tort, the allegation of a contract of carriage is a mere inducement to show the right to sue as a passenger. Id. Where a passenger is entitled to damages for breach of the carrier's duty, the remedy is in tort. Id. In a suit against a common carrier for breach of duty in carrying passenger beyond his station, the action is one in tort, unless a special contract clearly appears. Id.

It was agreed that an agent should receive a stated commission for the sale of machinery; that commissions should be paid on cash payments only; and that no commission was to be paid or retained on sales made to irresponsible parties, nor where the debts for which the machinery was sold were uncollectible. The agent under this contract sold machinery which was to be paid for at a future time, and represented that the notes taken were good, and would be paid at maturity. The principal, relying on these statements, paid the commission in full, and afterwards it was found that the purchasers who gave the notes were insolvent, and only a small part of the purchase price was paid. Held, that an action brought by the principal to recover the difference between the commission which was paid and the amount actually earned by the agent under the terms of the contract was an action arising on contract, and was not barred by the two-years statute of limitations. Frick & Co. v. Larned, 32 P. 383, 50 Kan. 776.

Where a mortgagee sends through a bank part of the money loaned to a contractor, to be paid by the receiving bank to a creditor having a claim against the property mortgaged, and the receiving bank applies it to a debt owing it by the contractor, an action for such misapplication is an action on an implied contract, and not in tort. Winfield Nat. Bank v. Railroad Loan & Savings Ass'n, 81 P. 202, 71 Kan. 584.

[19] Hobbs v. Smith, 115 P. 347, 27 Okl. 830, 34 L. R. A. (N. S.) 697.

In action for alleged wrongful taking of valuable fossil from plaintiff's land and converting it, petition held to show waiver of tort and reliance on implied promise to pay value of property. Garrity v. State Board of Administration of Educational Institutions, 162 P. 1167, 99 Kan. 695.

[20] Weems v. Melton, 47 Okl. 706, 150 P. 720.

An owner whose property has been converted to the use of another may

son of a relation created by contract, may either sue on the contract or bring an action ex delicto.[21]

In an action of tort by a passenger for a wrongful expulsion from a train before he reached the station for which he had purchased a ticket, he cannot recover as for a breach of contract to convey him to the station;[22] but where he has complied with the rules of procedure as to the form of action and his pleading, he cannot be precluded from recovering for humiliation because of a doubt as to whether his suit was ex contractu or ex delicto.[23]

§ 281. Illegal transactions

One cannot maintain an action based on his own turpitude,[24] or to aid in effecting a wrong or fraud upon the defendant.[25]

As a general rule, an action which grows out of and is founded

waive the tort, and bring his action on implied contract for the value of the property. Altman v. Phillips County Bank, 122 P. 874, 86 Kan. 930.

Where a person takes and sells the property of another, the owner may elect to waive the tort and sue upon the implied contract for the value of the same; and whether he has so elected, and the nature of the action, are to be determined by the court from the pleadings. Smith v. McCarthy, 18 P. 204, 39 Kan. 308.

Where a bank clerk appropriates the money of a bank, it may waive the tort and sue on an implied contract that the clerk would be honest and faithful. Lipscomb v. Citizens' Bank of Galena, 71 P. 583, 66 Kan. 243.

Where a commission merchant receives mortgaged cattle for sale without the knowledge or consent of the mortgagee and in violation of the terms of the mortgage, and pays the proceeds, less his commission, to the consignor, without notice of the mortgage, he does not derive such a benefit from the transaction as to authorize the mortgagee to waive the tort and recover on an implied contract. Greer v. Newland, 78 P. 835, 70 Kan. 315, 70 L. R. A. 554, 109 Am. St. Rep. 424, judgment, 77 P. 98, 70 Kan. 310, 70 L. R. A. 554, 109 Am. St. Rep. 424, reversed on rehearing.

[21] Chicago, R. I. & P. Ry. Co. v. Harrington, 44 Okl. 41, 143 P. 325.

[22] Noble v. Atchison, T. & S. F. R. Co., 46 P. 483, 4 Okl. 534.

[23] St. Louis & S. F. R. Co. v. Yount, 30 Okl. 371, 120 P. 627.

[24] A litigant cannot found his action on his own violation of the law. Friedman & Co. v. State, 131 P. 529, 37 Okl. 164.

Where the owner of land deeded it to R. who did not record his deed, and afterwards the holder of a void tax deed quieted his title against a defendant of the same name as the grantee, and such title was purchased for $800 by defendant, who improved the land, and where by deceit C. then procured from the original owner a deed for $15, the maxim that "one cannot maintain

[25] The bringing of an action to recover personalty, by one having no interest therein within Code Civ. Proc. § 25 (Gen. St. 1909, § 5618), or the exceptions thereto, at the instance of an outsider to aid him in effecting the wrong, is a fraud on defendant. Burdett v. Surdez, 146 P. 1025, 94 Kan. 494.

upon an illegal transaction, where the plaintiff and defendant are in equal guilt, cannot be maintained.[26]

§ 282. Injury without liability

A railway company operating within the scope of its power has the right to the use of its property and the lawful enjoyment thereof; and if, in the enjoyment of this right, a loss occurs to another, it is a wrong for which there is no liability.[27]

§ 283. Tenders

"When a tender of money is alleged in any pleading, it shall not be necessary to deposit the money in court when the pleading is filed, but it shall be sufficient if the money is deposited in court at trial, or when ordered by the court." [28]

§ 284. Right of action—Warrantee—Costs and expenses

"If a warrantor or other person bound by a warranty shall fail to appear and defend after due notice" as provided by law, "the warrantee may defend the action and recover in a separate suit all sums expended the same as he might do in the same suit." [29]

§ 285. —— Action on surveyor's bond

"Any person who may think himself injured by the neglect or misconduct of any county surveyor, or any of his deputies, may institute suit on the bond executed by such county surveyor and his sureties, and in case the party for whose benefit such suit may be brought shall obtain a judgment for any damage or loss by him sustained, he may sue out an execution on such judgment as in

an action based on his own turpitude" barred C. from recovering in an action to eject defendant. Chandler v. Austin, 132 P. 1004, 90 Kan. 62.

A contention that a note against decedent should not be allowed against his estate because it had not been returned for taxation is not meritorious, since, in order to obtain judgment on the note, plaintiff did not have to claim under any unlawful act, nor was the court required to pass on any violation or attempt to evade the law on plaintiff's part. Brewster v. Light, 65 P. 248, 63 Kan. 882.

[26] Hinnen v. Newman, 12 P. 144, 35 Kan. 709.

Whenever it appears during the trial that the cause of action on which plaintiff relies arose out of an unlawful conspiracy, the court should immediately refuse aid to either party. Patterson v. Imperial Window Glass Co., 137 P. 955, 91 Kan. 201.

[27] St. Louis & S. F. R. Co. v. Burrous, 118 P. 143, 29 Okl. 378.

[28] Rev. Laws 1910, § 4782.

[29] Rev. Laws 1910, § 1168.

other cases and the bond may be sued on in like manner by each and every person aggrieved." [30]

§ 286. —— Surety against principal

"A surety may maintain an action against his principal, to compel him to discharge the debt or liability for which the surety is bound, after the same has become due.

"A surety may maintain an action against his principal, to obtain indemnity against the debt or liability for which he is bound, before it is due, whenever any of the grounds exist, upon which, by the provisions of this Code, an order may be made for arrest and bail, or for an attachment.

"In such action the surety may obtain any of the provisional remedies mentioned in articles 8, 9 and 10, upon the grounds and in the manner therein prescribed." [31]

§ 287. Money received

Where one has money of another which he in good conscience has no right to retain, an action will lie to recover it.[32]

§ 288. Conditions precedent—Warranty

"In all cases where an action is brought against a grantee to recover real estate conveyed to him by warranty deed, he must notify the grantor or person bound by the warranty that such suit has been brought, at least twenty days before the day of trial, which notice shall be in writing and shall request such grantor or other person to defend against such action; and in case of failure to give such notice there shall be no further liability upon such warranty, except when it is clearly shown that it was impossible to make service of such notice." [33]

§ 289. —— Death pending action

"If an action is pending against the decedent at time of his death, the plaintiff must in like manner present his claim to the executor or administrator, for allowance or rejection, authenti-

[30] Rev. Laws 1910, § 1727.
[31] Rev. Laws 1910, §§ 5307, 5308, 5309.
[32] Helm v. Mickleson (Okl.) 170 P. 704; Allsman v. Oklahoma City, 95 P. 468, 21 Okl. 142, 16 L. R. A. (N. S.) 511, 17 Ann. Cas. 184.
[33] Rev. Laws 1910, § 1166.

cated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentation required." [34]

§ 290. —— Claim against estate

"No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator." [35]

A claim for a fund wrongfully misappropriated by a guardian need not be presented to the administrator of the guardian's surety, before action therefor.[36]

§ 291. —— Usury

Before any suit can be brought to recover usurious interest, the party bringing such suit must make written demand for return of such usury.[37]

§ 292. —— Claim against municipality

That a claim against a city for unliquidated damages arising out of a tort is not itemized, verified, and filed does not prevent a suit being maintained thereon, but merely precludes the plaintiff from recovering costs.[38]

Where a party having sustained a personal injury for which he claims that a city is liable, presents his bill therefor to the city council for allowance, which is by such council disallowed, he may thereafter sue for and recover all the damages sustained, though such damages exceeded the amount claimed in the bill.[39]

§ 293. —— Offer—Demand—Notice

No failure to make an offer of performance can be insisted on as a bar to an action, where that offer would have been rejected.[40] An offer to restore or do equity is necessary only when the court

[34] Rev. Laws 1910, § 6348.

[35] Rev. Laws 1910, § 6346.

[36] Asher v. Stull, 61 Okl. 320, 161 P. 808; Donnell v. Dansby, 58 Okl. 165, 159 P. 317.

[37] Rev. Laws 1910, § 1005.

[38] Town of Sallisaw v. Ritter, 142 P. 391, 42 Okl. 626, Rev. Laws 1910, § 603.

[39] City of Oklahoma City v. Welsh, 41 P. 598, 3 Okl. 288.

[40] St. Louis & S. F. R. Co. v. Richards, 102 P. 92, 23 Okl. 256, 23 L. R. A. (N. S.) 1032.

would otherwise be powerless to give defendant whatever relief he may be entitled to against plaintiff.[41]

No demand is ordinarily necessary before commencing suit for

[41]A minor Creek on attaining her majority may sue to cancel a void deed executed during her minority, without offering to restore the consideration, where it never reached her hands, or was immediately paid over to one with whom she was illegally cohabiting, and was never returned to her. Blakemore v. Johnson, 103 P. 554, 24 Okl. 544.

In a suit in equity by a minor Creek freedman to cancel a deed executed by her during minority, it is unnecessary to formally allege an offer to do equity by returning the consideration received by her during minority. Stevens v. Elliott, 30 Okl. 41, 118 P. 407.

In a suit in equity to cancel a void deed, made by a minor Creek freedman during minority, the court has full power to impose as a condition to the cancellation of such deed the return of the consideration received, or such part thereof as the minor may have in his or her possession upon attaining majority, and an offer to do equity or return such consideration is an unnecessary pleading. Stevens v. Elliott, 30 Okl. 41, 118 P. 407.

In a minor Creek freedman allottee's action to set aside a void deed, plaintiff need not plead formal tender to restore consideration. McKeever v. Carter, 53 Okl. 360, 157 P. 56.

A return of the consideration held not a necessary prerequisite to the cancellation of a deed executed to Indian lands in violation of section 16 of the Supplemental Creek Agreement of June 30, 1902. Oates v. Freeman, 57 Okl. 449, 157 P. 74.

In action to set aside void conveyance of lands of Indian minor allottee, it is not necessary for plaintiff to plead formal tender and offer to return consideration as condition precedent to action. Bell v. Fitzpatrick, 53 Okl. 574, 157 P. 334. That minor Indian allottee in her own name brought suit to set aside void conveyance of allotted lands, executed after May 27, 1908, and permitted suit to be dismissed with prejudice, did not bar subsequent suit on attaining majority to cancel deed and have it removed as cloud on title. Id. Guardian of Indian minor allottee cannot, by commencing action and entering into compromise and settlement, divest title of minor to lands or create estoppel against allottee thereafter asserting invalidity of conveyance. Id.

Insured seeking to rescind contract substituting life insurance policies and accompanying loan agreement held not required to offer compensation for time he had protection of policy issued under contract induced by insurer's fraud. Myler v. Fidelity Mut. Life Ins. Co. of Philadelphia, 64 Okl. 293, 167 P. 601.

In suit to declare deed a mortgage and to enforce lien, plaintiff's failure to tender reconveyance of land did not defeat relief, as court of equity, to do justice between the parties, might compel plaintiff to do equity before granting him any relief. Huff v. Lynde-Bowman-Darby Co. (Okl.) 175 P. 250.

Where under invalid proceedings in probate court lands of minor citizen of Choctaw Nation were disposed of, held that minor was not bound to return consideration received in absence of showing that she had in her possession any of such consideration. Bridges v. Rea, 64 Okl. 115, 166 P. 416.

Where minor citizen of Choctaw Nation sues to set aside void guardianship sale of his land and alleges that he has received no part of considera-

conversion,[42] nor is it always necessary that notice be given to sureties on an employé's bond of the employé's default.[43]

§ 294. —— Taxes

Where a tax levy is void, tender of a portion thereof is not a condition precedent to a taxpayer's right to enjoin the collection of same.[44]

tion, he need not tender or pay back such consideration as a prerequisite to maintenance of suit. Winters v. Oklahoma Portland Cement Co. (Okl.) 164 P. 965.

An action to recover entire purchase money when due held not maintainable, unless plaintiff should offer to convey or tender a deed on full payment. Dubois v. Andrews, 57 Okl. 227, 152 P. 440.

Where it appears from contract to sell land that it was intention of parties that payment of price should precede delivery of deed, or time for payment was fixed, and no time for conveyance, offer to convey is not required before action for price. Sooter v. Janes, 57 Okl. 368, 157 P. 282.

Where the vendor took notes for the deferred payments, and the purchaser took possession, and the contract provided that, on the purchaser's default the vendor should keep any payments as liquidated damages, the vendor was not compelled to resort to specific performance before enforcing the notes. Shelton v. Wallace, 137 P. 694, 41 Okl. 325.

Tender of deed is not condition precedent to action to enforce vendor's lien. Ames v. Milam, 53 Okl. 739, 157 P. 941. Notice by vendor of intention to declare future payments due was not essential prerequisite to action to foreclose vendor's lien. Id.

[42] In a mortgagee's action for conversion, against the purchaser of mortgaged chattels, demand and refusal need not be proven, where the purchaser knew of the mortgagee's rights or converted the property to his own use. Bank of Commerce of Ralston v. Gaskill, 44 Okl. 728, 145 P. 1131. An absolute sale by the chattel mortgagor, to the exclusion of the mortgagee, works a conversion of the chattels for which the mortgagee may sue without previous demand. Id.

In a suit for conversion of a ring pledged as collateral to secure a note, no demand of pledgee for return of the property is necessary where the same has been sold by him pending the right to redeem. Clinton Nat. Bank v. McKennon, 110 P. 649, 26 Okl. 835.

Where a sheriff, under a writ of attachment, seized and converted property to the possession of which a mortgagee had a prior right, no demand of the sheriff for the return of the property was necessary. Johnson v. Anderson, 57 P. 513, 60 Kan. 578.

In action for conversion of a wagon shipped by defendant carrier, a formal demand and specific tender of the amount of freight held unnecessary. Atchison, T. & S. F. Ry. Co. v. Etherton, 45 Okl. 260, 145 P. 779.

[43] Where an agent for the delivery of pictures and collection of the price makes reports as required by the contract of agency, in which reports his shortage appears, and where his conduct is not inconsistent with honesty,

[44] Eakin v. Chapman, 44 Okl. 51, 143 P. 21.

A party seeking equitable relief against an assessment must himself offer to do equity, and pay the amount of taxes which the facts show would have properly been charged against him under proper assessment.[45]

§ 295. —— Insurance

The conditions precedent to suit, prescribed in a policy of insurance, must be complied with,[46] unless they be waived,[47] or become

his employer is not required to notify the sureties upon his bond to the employer, conditioned to account for pictures and frames shipped to him for delivery, of his default, as a condition precedent to its recovery upon the bond for either the first reported shortage, or shortage subsequent to the first. Chicago Crayon Co. v. Rogers, 30 Okl. 299, 119 P. 630.

[45] Rogers v. Bass & Harbour Co. (Okl.) 168 P. 212.

[46] *Examination.*—Refusal to comply with a requirement that insured submit before action to an examination under oath, will preclude recovery on the policy. Connecticut Fire Ins. Co. of Hartford, Conn., v. George, 52 Okl. 432, 153 P. 116. Where, during the examination provided for in a fire insurance policy, insured refused to answer material questions, he could not recover on the policy, though at the close of his testimony at such examination he stated that he would not refuse to answer any reasonable question. Id. That the examination was not conducted in good faith, held not to excuse plaintiff's failure to answer material questions. Id. While in an examination of insured the insurer cannot inquire into a proposition having no legitimate bearing on the question at issue, the examination should be liberal in scope to reach the end intended. Id. Where insured refused to state on his examination whether he had executed certain mortgages on the insured property in excess of the amount stated in his application, he was thereby precluded from recovering on the policy. Id.

Proof of loss.—Where a fire insurance policy provides that in case of loss the insured shall give notice of loss and within 60 days make verified proof of loss in writing and that a compliance with this provision is a condition precedent to an action, the right of action does not mature till the provision has been complied with or waived. Commercial Union Assur. Co., Limited, of London, England, v. Shults, 130 P. 572, 37 Okl. 95.

A policy provided for proof of loss in writing within 60 days after a fire, and that no action on the policy should be sustained until compliance with such requirement. Held, that an action brought before proof of loss rendered was prematurely brought. Nance v. Oklahoma Fire Ins. Co., 31 Okl. 208, 120 P. 948, 38 L. R. A. (N. S.) 426.

[47] Where a policy provides for an appraisement, and such appraisement is a condition precedent to an action where no appraisement is requested by either party, and the company denies liability, the insured is not precluded from recovering for failure to demand an appraisement. Oklahoma Fire Ins. Co. v. Mundel, 141 P. 415, 42 Okl. 270.

Failure of fraternal association to comply with by-laws as to disapproval of death claims excuses beneficiary from compliance with provision requiring claims to be submitted to proper tribunals within order before suit on certificate. Haskew v. Knights of Modern Maccabees, 58 Okl. 294, 159 P. 493.

wholly unnecessary or futile,[48] or be contrary to law or public policy.[49]

ARTICLE II

ELECTION OF REMEDIES

Sections
296. Necessity.
297. Effect.
298. What constitutes.

§ 296. Necessity

A party is not bound in all cases to make an election. The holder of a note held as collateral cannot be compelled to elect whether he will enforce the principal or the collateral obligation. After the debt falls due, he has the option to make the debt out of the property pledged, or to pursue his remedies against the pledgor as though the pledge had not been made.[50]

In an action for damages for wrongful attachment, plaintiff's right to treat such attachment as a conversion and to recover full value of the property depends on his timely election to do so.[51]

[48] It is not necessary to tender amount received in settlement of cash surrender value of policy over a loan before suit on the policy, where it is certain that tender will be refused. Jones v. New York Life Ins. Co., 122 P. 702, 32 Okl. 339.

Appraisement.—Where there was a total loss under a policy, no appraisement was necessary, though made by the policy a condition precedent to suit. Springfield Fire & Marine Ins. Co. v. Homewood, 122 P. 196, 32 Okl. 521, 39 L. R. A. (N. S.) 1182.

Provisions of a policy for appraisal on disagreement as to amount of loss, and making loss payable 60 days after its ascertainment, including an award by appraisers, when appraisal has been required, do not make appraisal a condition precedent to an action on the policy. American Ins. Co. of Newark, N. J., v. Rodenhouse, 128 P. 502, 36 Okl. 211.

Under a provision for an appraisement, it is as much the duty of the insurer as the insured to demand an appraisement; and such demand by the insured is not a condition precedent to an action on a policy. Rochester German Ins. Co. of Rochester, N. Y., v. Rodenhouse, 128 P. 508, 36 Okl. 378.

[49] Const. art. 23, § 9, prevents the abridging of the time within which rights under the law may be enforced and the requiring of any notice as condition precedent to maintaining of an action for breach of the duty imposed by law, but does not relate to acts that must be performed by the parties to an insurance policy as a part of the contract. Gray v. Reliable Ins. Co., 110 P. 728, 26 Okl. 592.

[50] Ricks v. Johnson, 62 Okl. 125, 162 P. 476.

[51] Wade v. Ray (Okl.) 168 P. 447, L. R. A. 1918B, 796.

§ 297. Effect

Where the law gives several means of redress based on conflicting theories, election of one and prosecution to final judgment is bar to adoption of any other.[52]

However, the commencement of an action in ignorance of the facts does not necessarily constitute an election. Thus an action to rescind a contract for exchange of land will not prevent the recovery of damages on the ground of election of remedies, where when the action was brought the plaintiff did not know that the defendant had deeded the land conveyed to him to an innocent purchaser.[53]

§ 298. What constitutes

Where the plaintiff sues one defendant, and by an amended petition seeks additional relief against other defendants, to which he is not entitled as against the original defendant, the filing of the original petition was not an election of remedies estopping relief as against other defendants; no elements of estoppel being pleaded or shown.[54]

[52] First Trust & Savings Bank of Chicago, Ill., v. Bloodworth (Okl.) 174 P. 545. Where application for loan was forwarded by agent of applicant and amount of mortgage loan was paid by mortgagee to it, action by mortgagor to recover amount of loan from his agent held an election of remedies barring defense to mortgage that consideration was not received. Id.

[53] Speed v. McMurray (Okl.) 176 P. 506.

[54] Marks v. Baum Bldg. Co. (Okl.) 175 P. 818.

CHAPTER VI

ABATEMENT, SURVIVAL AND REVIVOR

Sections
299-310. Article I.—Survival and abatement.
311-328. Article II.—Revivor.

ARTICLE I

SURVIVAL AND ABATEMENT

Sections
299. What actions survive.
300. Death or assignment.
301. Death of plaintiff.
302. Death of defendant.
303. Personal injuries.
304. Action for wrongful death.
305. Who may sue—Amount of recovery.
306. Party in representative capacity—Change.
307. Receiver.
308. Transfer of interest.
309. Where action does not survive.
310. Abatement—Pendency of another action.

§ 299. What actions survive

"In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same." [1]

The death of either party pending an appeal from a judgment denying a divorce abates the action, and where the record shows no property rights involved, the appeal will be dismissed.[2]

§ 300. Death or assignment

"An action does not abate by the death or other disability of a party, or by the transfer of any interest therein, during its pendency, if the cause of action survive or continue. In case of the death or other disability of the party, the court may allow the action to continue by or against his representatives or successors in inter-

[1] Rev. Laws 1910, § 5279.
[2] Bunger v. Bunger, 160 P. 976, 99 Kan. 22.

est, upon such terms and in such time as may be just under the circumstances presented. In case of any other transfer of interests, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action." [3]

§ 301. Death of plaintiff

A cause of action for recovery of money on an appeal bond passes to the personal representatives of a deceased plaintiff.[4]

An action for injuries caused by negligence does not abate on plaintiff's death.[5]

Where the execution of a mortgage is procured by duress, the cause of action therefor is not personal to the mortgagor, and his heirs may set up duress in an action to foreclose, or they may maintain an action for cancellation on such ground.[6]

§ 302. Death of defendant

"No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, for a nuisance, or against a justice of the peace for misconduct in office, which shall abate by the death of the defendant." [7]

An action for malicious prosecution abates on the death of the defendant, and the cause of action dies with him.[8]

Death of defendant pending appeal in an action for libel abates the action, and the appeal will be dismissed.[9]

When, in an action on a joint and several note, it is shown that one of the defendants has died since the action was filed and service had, the action abates only as to the deceased defendant, and on verdict returned against all the defendants the court may render judgment against the surviving defendants.[10]

Where a case is commenced against receivers, and the receivers

[3] Rev. Laws 1910, § 4695.
[4] Zahn v. Obert, 60 Okl. 118, 159 P. 298.
[5] Missouri Pac. Ry. Co. v. Bennett's Estate, 47 P. 183, 5 Kan. App. 231, judgment affirmed 49 P. 606, 58 Kan. 499.
[6] Drake v. High (Okl.) 172 P. 53.
[7] Rev. Laws 1910, § 5280.
[8] Loeser v. Loeser, 50 Okl. 249, 150 P. 1045.
[9] Lockett v. Tucker, 56 Okl. 552, 156 P. 323.
[10] Gillespie v. First Nat. Bank, 95 P. 220, 20 Okl. 768.

die, and a receiver de bonis non is appointed, and no attempt is made to revive the action for more than a year, a motion to abate the action will be sustained.[11]

An action by a wife for alienation of her husband's affections does not abate by her death while the action is pending in the Supreme Court.[12]

§ 303. Personal injuries

An action for personal injuries not resulting in death survives to the personal representatives.[13]

The representative is entitled to have included in the verdict the same allowance for pain and suffering of the deceased as deceased would have had had he lived.[14]

An action may be maintained by an injured person against the administrator of the wrongdoer's estate.[15]

§ 304. Action for wrongful death

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." [16]

[11] Hutchings v. Eddy, 50 P. 944, 6 Kan. App. 490.

[12] Powers v. Sumbler, 110 P. 97, 83 Kan. 1.

[13] Martin v. Missouri Pac. Ry. Co., 49 P. 605, 58 Kan. 475.

The common-law right of action, which survives the death of the injured person, is independent of the right of action given for the recovery of damages for the benefit of the widow and next of kin. St. Louis & S. F. R. Co. v. Goode, 142 P. 1185, 42 Okl. 784, L. R. A. 1915E, 1141. The common-law right of action for personal injuries survives the death of the injured person and vests in his personal representative, though the death resulted from such injuries. Id.

[14] Atchison, T. & S. F. R. Co. v. Rowe, 43 P. 683, 56 Kan. 411.

[15] Casteel v. Brooks, 46 Okl. 189, 148 P. 158.

[16] Rev. Laws 1910, § 5281.

A cause of action arising under St. 1893, § 4313 (Rev. Laws 1910, § 5281), for wrongful death, will survive the death of the beneficiary named therein, and may be revived and prosecuted by his administratrix. City of Shawnee v. Cheek, 137 P. 724, 41 Okl. 227, 51 L. R. A. (N. S.) 672, Ann. Cas. 1915C, 290.

St. 1893, § 4313 (Rev. Laws 1910, § 5281), authorizing recovery for wrong-

In the absence of a statutory or constitutional provision an action cannot be maintained for the wrongful death of another;[17] for at common law the death of a human being, though clearly involving pecuniary loss, was not a ground of an action for damages.[18]

The provision of the Constitution that the right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, does not change the method of procedure in such cases.[19]

§ 305. —— Who may sue—Amount of recovery

"In all cases where the residence of the party whose death has been caused as set forth in the preceding section, is at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in the said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased." [20]

In an action under the statute for the wrongful death of a spouse,

ful death, confers upon the beneficiary thereof a property right in the pecuniary value to him of the decedent's life, and gives him a new cause of action for the pecuniary loss which he has sustained from such death. City of Shawnee v. Cheek, 137 P. 724, 41 Okl. 227, 51 L. R. A. (N. S.) 672, Ann. Cas. 1915C, 290.

Comp. Laws 1909, §§ 2881, 2882, held not to give a right of action for wrongful death; such right being conferred alone by Wilson's Rev. & Ann. St. 1903, §§ 4611, 4612. Shawnee Gas & Electric Co. v. Motesenbocker, 138 P. 790, 41 Okl. 454.

Civ. Code, § 422, does not change a pending action for injuries brought by the deceased in his lifetime into an action for wrongful death. Missouri Pac. Ry. Co. v. Bennett's Estate, 47 P. 183, 5 Kan. App. 231, judgment affirmed 49 P. 606, 58 Kan. 499.

Laws 1889, c. 131, supplementing Civ. Code, § 422, giving an action for wrongful death, does not, by providing that a cause of action given by section 422 shall not be lost because of nonresidence of the deceased or nonappointment of a representative, create a new cause of action, or impose any limitation on an existing one. Atchison, T. & S. F. R. Co. v. Napole, 40 P. 669, 55 Kan. 401.

[17] City of Eureka v. Merrifield, 37 P. 113, 53 Kan. 794.

[18] Missouri, K. & T. Ry. Co. v. Lenahan, 135 P. 383, 39 Okl. 283.

[19] Shawnee Gas & Electric Co. v. Motesenbocker, 138 P. 790, 41 Okl. 454.

[20] Rev. Laws 1910, § 5282.

parent, or child, the plaintiff is limited in damages to the pecuniary loss sustained by the wrongful death.[21]

[21] Blunt v. Chicago, R. I. & P. R. Co. (Okl.) 173 P. 656; Missouri, K. & T. Ry. Co. v. West, 38 Okl. 581, 134 P. 655.

In an action for the wrongful killing of plaintiff's child, unless the evidence shows a reasonable expectation that the child would have contributed to the support of his parents after majority, the damages are limited to the amount which will compensate for loss of the child's services to his majority. Muskogee Electric Traction Co. v. Hairel, 46 Okl. 409, 148 P. 1005.

In an action for the benefit of dependent children, the measure of damages, under federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), is such an amount as deceased would reasonably be expected to have contributed to their support and education. Kansas City, M. & O. Ry. Co. v. Roe, 50 Okl. 105, 150 P. 1035.

The measure of damages for the wrongful death of the husband and father was the pecuniary loss suffered by the widow and minor children by being deprived of his care and support, as determined by his age, physical condition, occupation, earning capacity, and the use made by him of his earnings. Big Jack Mining Co. v. Parkinson, 137 P. 678, 41 Okl. 125.

In action for wrongful death of son, where there is evidence of parent's dependency and a reasonable expectation of contribution from son, the measure of damages is the amount compensating parent for loss sustained by son's death. Lusk v. Phelps (Okl.) 175 P. 756.

In action for wrongful death of their son, dependent parents may recover damages on account of contributions he would probably have made. Weleetka Cotton Oil Co. v. Brookshire (Okl.) 166 P. 408.

In an action by the administrator of a deceased minor, it is within the province of the jury to estimate the damages with reference to the pecuniary injury, present or prospective, resulting to next of kin, from the facts proved, in connection with their own knowledge and common experience, and it is not necessary that any witness should have expressed an opinion of the amount of such loss. Union Pac. Ry. Co. v. Dunden, 14 P. 501, 37 Kan. 1.

In an action to recover damages for the services of a minor son killed by the alleged negligence of defendant, and to recover the benefits which plaintiffs expected to receive from him by way of support after he reached his majority, plaintiffs' right to recover for such expected benefits is limited to their lives, and is not the amount they might have expected to receive from the son after he reached majority and during the time he had continued to live. Fidelity Land & Improvement Co. v. Buzzard, 76 P. 832, 69 Kan. 330.

An action under Civ. Code, § 422, providing for the recovery of damages for wrongfully causing a death, is for pecuniary loss to those entitled to the recovery, and, when brought in behalf of the next of kin to whose support the deceased was under no legal obligation to contribute, it can be maintained for substantial damages only by proof that he was in the habit of contributing to their support or education, and might be reasonably expected to continue such habit, or by proof of declarations, acts, conduct, or relevant circumstances reasonably tending to show an intention on his part to make such contributions of support or education; and hence where a case lacks such proof a verdict for $5,000 damages for the death cannot be sustained. Atchison, T. & S. F. Ry. Co. v. Ryan, 64 P. 603, 62 Kan. 682.

In an action by nonresident alien partent to recover for the death of their

Thus, loss of society and protection,[22] the mental anguish and suffering of the deceased,[23] and the mental anguish and suffering of the widow are not proper items of damage in such action.[24]

minor son, proof as to the value of actual services rendered or which might have been rendered by the minor son is not indispensable, but there must be evidence to justify a reasonable expectation of pecuniary benefit to his parents in the continuance of his life. Atchison, T. & S. F. Ry. Co. v. Fajardo, 86 P. 301, 74 Kan. 314, 6 L. R. A. (N. S.) 681.

In a suit to recover damages for the death of a minor, under Civ. Code, § 422, the fact that the parents had released to such minor his time and services during his minority may be considered in determining the amount of recovery. St. Joseph & W. R. Co. v. Wheeler, 10 P. 461, 35 Kan. 185.

In an action for death, it appeared: That decedent was 21 years old, unmarried, of normal physique, and in good health; that he was industrious, steady, and without bad habits; that his relations with his parents were most pleasant; that he had been away from home since he was 19, and during that time his parents had made no claim to his earnings; that, though they were neither old nor indigent, he contributed to their support, the last occasion being shortly before he was killed; that altogether he had sent home $35, and at time of death was earning $1.75 a day; that his motive for leaving home was to see something of the world; and that arrangements had been made for him to go home and help his father run two farms, which would have been mutually advantageous. Held, that the father and mother had the right to expect to receive pecuniary benefits from his continued life and sufficient data appeared from which damages sustained by his death could be computed. Pittsburg Vitrified Pav. & Bldg. Brick Co. v. Fisher, 100 P. 507, 79 Kan. 576.

Amounts held not excessive.—See L. R. A. 1916C, 820.

A recovery of $15,000 for death of an employé who had earned as much as $160 a month and was 30 years old, sober and healthy, and who left a wife and small child, held not excessive in view of Const. art. 23, § 7 (Williams' Const. § 356), providing that the damages for wrongful death shall not be subject to any statutory limitation. St. Louis & S. F. R. Co. v. Long, 137 P. 1156, 41 Okl. 177, Ann. Cas. 1915C, 432.

The recovery of $15,000 for the death of the husband by his widow, suing for herself and minor children, held not excessive. San Bois Coal Co. v. Resetz, 143 P. 46, 43 Okl. 384.

A recovery of $15,000 for wrongful death of the husband and father held not excessive, where he was 38 years of age, in good health, and earning $83.33 per month at the time of his death, with a steadily increasing earning capacity, and it appeared that such amount was just one-half of his cash

[22] Missouri, O. & G. Ry. Co. v. Lee, 175 P. 367.

[23] In an action by the widow and children of decedent under Rev. Laws 1910, § 5281, for wrongful death, plaintiffs cannot recover for his mental anguish and suffering, any recovery therefor belonging to his estate. Smith v. Chicago, R. I. & P. Ry. Co., 142 P. 398, 42 Okl. 577.

[24] Missouri, O. & G. Ry. Co. v. Lee (Okl.) 175 P. 367.

Nominal damages may be recovered, if it appears that the death was caused by the wrongful act or omission of the defendant, though no actual damages are shown.[25]

probable earnings during his life expectancy. Missouri, K. & T. Ry. Co. v. West, 38 Okl. 581, 134 P. 655.

An award of $3,000 for causing the death of a man 24 years old, unmarried, who had been in this country for two years, and was earning $30 a month besides his board and lodging, the recovery being for the benefit of his parents, aged 58 and 55, living in Russia, to whom he had sent money at different times in amounts varying from $25 to $60, was not excessive. Cox v. Kansas City, 120 P. 553, 86 Kan. 298.

A verdict of $4,500 for the death of a brakeman 34 years of age, with a life expectancy of 32 years, in favor of his mother, a widow 59 years of age, was not excessive, where intestate was a single man, earning $60 to $75 per month, and had resided with, and wholly supported, his mother for 10 years. St. Louis & S. F. Ry. Co. v. French, 44 P. 12, 56 Kan. 584.

A verdict of $7,830 was not excessive for negligently causing the death of a miner 40 years old, of sound body and good habits, and capable of earning $42 per month. Atchison, T. & S. F. R. Co. v. Hughes, 40 P. 919, 55 Kan. 491.

A judgment for $3,000 for the wrongful death of a minor, who was 11 years and 8 months old, intelligent, healthy, and promising, and left surviving him a father, a poor man, working as an engineer, and having a wife and three children, held not grossly excessive. Union Pac. Ry. Co. v. Dunden, 14 P. 501, 37 Kan. 1.

In mother's action for damages for wrongful death of son, a verdict for $5,000 was not excessive, where deceased was 33 years of age, was in good health, able to earn $1,000 a year, and was accumulating property. Berry v. Dewey, 172 P. 27, 102 Kan. 593.

Verdict for $4,000 for widow, $5,250 for four year old child, and $5,750 for two year old child of deceased railroad employé killed in interstate commerce, who was 26 years of age, industrious, and had constant employment at from $2.50 to $3.50 per day, was not excessive. Griffith v. Midland Valley R. Co., 100 Kan. 500, 166 P. 467.

Allowance of $1,250 to widow of deceased railroad employé for estimated pecuniary loss from his death held not large enough to justify interference, although money sent to her by deceased during his absence of 13 years did not exceed $110. Forbes v. Atchison, T. & S. F. Ry. Co., 101 Kan. 477, 168 P. 314.

An award of $12,000 for death of man 38 years old, with family, and

---

[25] Atchison, T. & S. F. R. Co. v. Weber, 6 P. 877, 33 Kan. 543, 52 Am. Rep. 543.

In an action for the benefit of the parents, to recover for the alleged negligent killing of their son, who was grown up, of full age, and living apart from them, but was unmarried, no proof was offered of the parents' financial condition, or that they had ever received any actual pecuniary benefits from the son during his lifetime; nor was there any evidence showing a reasonable probability of pecuniary advantage to them from the continuance of the son's life. Held, that no more than nominal damages should have been recovered. Cherokee & P. Coal & Mining Co. v. Limb, 28 P. 181, 47 Kan. 469

Financial benefits to the sole heir of a person who has lost his life by wrongful act of another cannot be deducted from damages sustained, and the verdict and judgment reduced by such benefits.[26]

§ 306. Party in representative capacity—Change

Proceedings in revivor are not necessary in substituting a new next friend for one who had previously acted in behalf of an in-

earning about $75 per month, held not excessive, where the action was brought under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), and the accident arose from a violation of the Safety Appliance Act as amended March 2, 1903 (U. S. Comp. St. §§ 8613–8615). Thornbro v. Kansas City, M. & O. Ry. Co., 139 P. 410, 91 Kan. 684, Ann. Cas. 1915D, 314, rehearing granted 139 P. 1199, and judgment affirmed on rehearing 142 P. 250, 92 Kan. 681.

A recovery of $8,000 for wrongful death of plaintiff's husband held not excessive. Corley v. Atchison, T. & S. F. Ry. Co., 147 P. 842, 95 Kan. 124.

Amounts held excessive.—See L. R. A. 1916C, 820.

Verdict of $30,000 awarded widow of tool sharpener 35 years of age, employed in and about drilling of oil well, killed by an explosion of escaping gas, who moved about following oil industry, and had once been a railroad fireman, was excessive, and would be reduced to $20,000, or a new trial granted. Slick Oil Co. v. Coffey (Okl.) 177 P. 915.

Where deceased at the time of his death was 66 years of age, unmarried, a farmer living on leased land, who owned only a small amount of personal property, and plaintiffs in an action for his wrongful death were his nephews and nieces in comfortable circumstances and to whom he had made casual gifts, a verdict of $7,000 was excessive. Missouri, K. & T. Ry. Co. v. McLaughlin, 84 P. 989, 73 Kan. 248.

In an action for the death of plaintiff's son 19 years old and earning from $1.50 to $1.75 a day, a verdict of $10,000 will be reduced to $6,000. Aaron v. Missouri & K. Telephone Co., 131 P. 582, 89 Kan. 186, 45 L. R. A. (N. S.) 309.

In an action for the death of plaintiffs' son, a railroad engineer, a verdict for $6,000 held excessive and reduced to $4,000. Denver v. Atchison, T. & S. F. R. Co., 150 P. 562, 96 Kan. 154, Ann. Cas. 1917A, 1007.

In an action for the death of one killed on a railroad, the evidence as to the pecuniary value of the life of decedent was to the effect that she was 59 years old, the mother of five children; that she was possessed of superior intelligence, and was active, vigorous, and in good health; and that one son, 21 years of age, lived with her. There was no evidence as to the ages of the other children, whether they lived with decedent, or whether any of decedent's children were dependent on her for support. Held, that a verdict of $1,000 would be considered more than nominal damages, and, the evidence being insufficient to show actual damage, the verdict would be set aside as excessive. St. Louis & S. F. R. Co. v. Blinn, 62 P. 427, 10 Kan. App. 468.

[26] Berry v. Dewey, 172 P. 27, 102 Kan. 593.

In an action for wrongful death of plaintiff's son, an instruction that in considering damages the jury might consider the fact that plaintiff inherited an allotment belonging to the son is erroneous. Missouri, K. & T. Ry. Co. v. James, 61 Okl. 1, 159 P. 1109.

fant.[27] Where a suit is brought by a guardian, and pending the action the wards became of age, the suit does not abate, the guardian is properly discharged, and revivor is neither necessary nor proper.[28]

§ 307. —— Receiver

The rights and remedies of plaintiff to recover for wrongfully seizing his store, under a chattel mortgage against the stock, did not abate with the appointment of a receiver.[29]

Where it appears from the action of a federal court in discharging a receiver appointed by it of an electric railway that the railway was taken out of the hands of the receiver and restored to the company, and that cases pending in the state courts against the receiver were turned over to the company to defend, and the company ordered to save the receiver harmless from any judgment that might be entered against him in such cases, and, in the event of failure to do so, the property to be held responsible therefor, the order evidently contemplated a continuance of the cases in the name of the receiver, and it was not error to overrule a motion to dismiss an action in a state court on the ground that the receiver had been discharged by the federal court.[30]

§ 308. Transfer of interest

In case of a transfer of a claim sued on, the action may proceed in the name of the original party,[31] though assigned by him upon certain conditions which afterwards fail,[32] or the assignee may be substituted.[33]

[27] Missouri Pac. Ry. Co. v. Moffatt, 55 P. 837, 60 Kan. 113, 72 Am. St. Rep. 343.

[28] Shattuck v. Wolf, 83 P. 1093, 72 Kan. 366.

[29] Tootle v. Kent, 73 P. 310, 12 Okl. 674.

[30] Peterson v. Baker, 97 P. 373, 78 Kan. 337.

[31] Rev. Laws 1910, § 4695.

An action on an account does not abate because of a transfer of an interest therein. Werner v. Hatton, 38 P. 279, 54 Kan. 250.

An averment in the answer that plaintiff had conveyed his interest in the land since the commencement of the action, which was not denied under oath, was not sufficient to bar a recovery by the plaintiff. Douglas v. Muse, 61 P. 413, 62 Kan. 865.

[32] Crocker v. Ball, 59 P. 691, 10 Kan. App. 364.

[33] A right of action for unlawful and forcible detainer by one entitled to possession, in case of a transfer of the interest of plaintiff, continues in his

A plaintiff in an action on a quantum meruit, who assigns during its pendency a part of his interest therein, may recover in his own name the amount assigned.[34]

Where a lessee after suing for possession surrenders his lease, it is proper to substitute the lessor as plaintiff.[35]

§ 309. Where action does not survive

"Where one of several plaintiffs or defendants dies, or his powers as a personal representative cease, if the cause of action do not admit of survivorship, and the court is of opinion that the merits of the controversy can be properly determined and the principles applicable to the case fully settled, it may proceed to try the same as between the remaining parties; but the judgment shall not prejudice any who were not parties at the time of trial."[36]

§ 310. Abatement—Pendency of another action

Where an action is brought in Oklahoma and jurisdiction acquired, and thereafter the action is brought in another state in which plaintiff in Oklahoma is there made defendant, and defendant in Oklahoma is served with a garnishment writ, the latter action cannot be pleaded in bar or abatement of the former.[37]

Two creditors of an insolvent corporation may proceed concurrently, to enforce the stockholders' liability; the pendency of proceedings by one being no bar to proceedings by the other.[38]

The pendency of another suit between the same parties upon a judgment rendered by a court in Illinois upon a written instrument is a bar to the prosecution of another suit on the same instrument.[39]

A pending action of forcible entry and detainer is no bar to an action of ejectment by the same landlord against the same tenant

grantee. Leach v. Sargent, 55 Okl. 203, 154 P. 1143; Anderson v. Ferguson, 71 P. 225, 12 Okl. 307.

[34] McKnight v. Bertram Heating & Plumbing Co., 70 P. 345, 65 Kan. 859.

[35] Leach v. Sargent, 55 Okl. 203, 154 P. 1143.

[36] Rev. Laws 1910, § 5284.

[37] Missouri, K. & T. Ry. Co. v. Bradshaw, 132 P. 327, 37 Okl. 317, L. R. A. 1917F, 1013.

[38] Buist v. Citizens' Sav. Bank, 46 P. 718, 4 Kan. App. 700.

[39] Westervelt v. Jones, 52 P. 194, 7 Kan. App. 70.

for the same land,[40] nor is it any bar to an action for rent or use and occupation.[41]

Where mandamus is pending in a state court to compel removal of a railroad bridge obstructing a river and flooding the neighborhood, a later proceeding in the federal court to foreclose a mortgage on the property does not abate the action in the state court nor oust its jurisdiction.[42]

A plea in abatement, alleging the pendency of a prior suit on the same cause of action, was properly overruled where the prior action was dismissed upon filing of the plea.[43]

An action which stands dismissed on motion of plaintiff is no bar to an action by the successor in interest of defendant.[44]

The pendency of garnishment proceedings in another state to subject the debt for which plaintiff sues constitutes no defense, where it appears that the court in which such proceedings are pending has no jurisdiction of the defendant.[45]

[40] Buettinger v. Hurley, 9 P. 197, 34 Kan. 585.

[41] Hart v. Ferguson (Okl.) 176 P. 396.

[42] Kaw Valley Drainage Dist. of Wyandotte County v. Missouri Pac. Ry. Co., 161 P. 937, 99 Kan. 188.

[43] Warnock v. Moore, 137 P. 959, 91 Kan. 262.

An action brought by the person in possession of an office prior to the commencement of the next regular term, for the purpose of enjoining a person claiming to be his successor from taking possession of the office, does not abate an action of quo warranto brought against such person after he has taken possession of the office, and been officially recognized, where it appears that such prior action has been dismissed before the trial of the quo warranto case. Snow v. Hudson, 43 P. 260, 56 Kan. 378.

[44] Jay v. Zeissness, 52 P. 928, 6 Okl. 591.

[45] Chicago, R. I. & P. Ry. Co. v. Campbell, 49 P. 321, 5 Kan. App. 423.

ARTICLE II

REVIVOR

Sections

311. Where action survives upon death of party.
312. Proceedings.
313. Who may move.
314. Consent or notice.
315. Notice by publication.
316. Death of plaintiff.
317. Death of defendant.
318. Limitation.
319. Amendment to petition.
320. Time of order.
321. Delay to revive.
322. Vacation of order.
323. Objections and waiver.
324. Action dismissed, when.
325. At instance of defendant.
326. Trial.
327. Death after judgment.
328. Revivor of judgment—Forms.

§ 311. Where action survives upon death of party

"Where there are several plaintiffs or defendants in an action, and one of them dies, or his powers as personal representative cease, if the right of action survive to or against the remaining parties the action may proceed, the death of the party or the cessation of his powers being stated on the record." [46]

"When one of the parties to an action dies, or his powers as a personal representative cease before the judgment, if the right of action survive in favor of or against his representatives or successors, the action may be revived and proceed in their names." [47]

Where a number of tenants in common of lands join in an action for the recovery thereof, and one of them dies during its pendency, surviving plaintiffs may continue the action for the recovery of their severable interests without a revivor.[48]

§ 312. —— Proceedings

"The revivor shall be by an order of the court, if made in term, or by a judge thereof, if in vacation, that the action be revived in the names of the representatives or successor of the party who

[46] Rev. Laws 1910, § 5283.
[47] Rev. Laws 1910, § 5285.
[48] Crane v. Lowe, 54 P. 666, 59 Kan. 606.

died, or whose powers ceased, and proceed in favor of or against them." [49]

Under this statute an application within a year from defendant's death to revive the action against his representative must be granted as a matter of right.[50]

§ 313. —— Who may move

"The order may be made on the motion of the adverse party, or of the representatives or successor of the party who died, or whose power ceased, suggesting his death or the cessation of his powers, which, with the names and capacities of his representatives or successor, shall be stated in the order." [51]

§ 314. Consent or notice

"If the order is made by the consent of the parties, the action shall forthwith stand revived; and, if not made by consent, notice of the application for such order shall be served in the same manner and returned at the same time as a summons, upon the party adverse to the one making the motion; and if sufficient cause be not shown against the revivor, the order shall be made." [52]

Where a judgment was rendered for defendant, and before perfecting appeal plaintiff died, and the cause was revived in plaintiff's administrator's name, without consent and without notice, the revivor below was illegal.[53]

No consent is necessary to revive action within one year from time order might have been first made, and, if made with consent, no notice is required. Where order to revive action is made within year from time when it might first have been made, without consent, notice and service required by Rev. Laws 1910, § 5288, become jurisdictional and mandatory. An order of revivor, made by trial court within a year, but without notice and without consent, is absolutely void.[54]

Appearance waives notice of application to revive an action.[55]

[49] Rev. Laws 1910, § 5286.
[50] Kilgore v. Yarnell, 103 P. 698, 24 Okl. 525; Boyes v. Masters, 114 P. 710, 28 Okl. 409, 33 L. R. A. (N. S.) 576.
[51] Rev. Laws 1910, § 5287.
[52] Rev. Laws 1910, § 5288.
[53] Olds v. Atchison, T. & S. F. Ry. Co. (Okl.) 175 P. 230.
[54] Zahn v. Obert, 60 Okl. 118, 159 P. 298.
[55] Crites v. City of Miami, 80 Okl. 50, 193 P. 984.

§ 315. —— Notice by publication

"When the plaintiff shall make an affidavit that the representatives of the defendant, or any of them, in whose name it is desired to have the action revived, are non-residents of the State, or have left the same to avoid the service of the order or notice, or so concealed themselves that the order or notice cannot be served upon them, or that the names and residence of the heirs or devisees of the person against whom the action may be ordered to be revived, or some of them, are unknown to the affiant, a notice may be published for three consecutive weeks, notifying them to appear on a day therein named, not less than ten days after the publication is complete, and show cause why the action should not be revived against them; and, if sufficient cause be not shown to the contrary, the order shall be made." [56]

§ 316. Death of plaintiff

"Upon the death of the plaintiff in an action, it may be revived in the names of his representatives, to whom his right has passed. Where his right has passed to his personal representatives, the revivor shall be in their names; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names." [57]

Under this statute, an order of revivor of an action relating to personal property in the names of heirs of deceased party is a nullity.[58]

Where plaintiff in replevin dies intestate, the action must be revived in the name of his administrator, and not of his heirs at law.[59]

Where a judgment creditor dies pending appeal, the judgment will not be revived on application of assignees of his judgment who are strangers to record over objection of plaintiffs in error, who seek revivor in name of administrator, when the latter would not prejudice assignees or decedent's estate.[60]

[56] Rev. Laws 1910, § 5289.
[57] Rev. Laws 1910, § 5290.
[58] Zahn v. Obert, 60 Okl. 118, 159 P. 298.
[59] Rexroad v. Johnson, 45 P. 1008, 4 Kan. App. 333.
[60] Schuber v. McDuffee, 59 Okl. 253, 158 P. 895.

§ 317. Death of defendant

"Upon the death of a defendant in an action, wherein the right, or any part thereof, survives against his personal representatives, the revivor shall be against them; and it may, also be against the heirs and devisees of the defendant, or both, when the right of action, or any part thereof, survives against them." [61]

"Upon the death of a defendant in an action for the recovery of real property only, or which concerns only his rights or claims to such property, the action may be revived against his heirs or devisees, or both, and an order therefor may be forthwith made, in the manner directed in the preceding section of this article." [62]

The court has discretionary power to revive, after death of defendant, an action to foreclose a mechanic's lien, and to carry same forward to final judgment.[63]

§ 318. Limitation

"An order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successors, unless in one year from the time it could have been first made, except as otherwise provided by law." [64]

An order to revive against representatives or successors of a deceased defendant cannot, in the absence of exceptional circumstances or special statute, be made without consent, unless made within one year after it could have first been made.[65]

The time within which an action may be revived against the representatives or successor of a deceased defendant, is a condition of the right to revive, and a party seeking to avail himself of its benefits must strictly comply with its terms.[66] It does not deprive the court of all discretion in the matter.[67]

[61] Rev. Laws 1910, § 5291.
[62] Rev. Laws 1910, § 5292.
[63] Glenn v. Payne, 48 Okl. 196, 149 P. 1151.
[64] Rev. Laws 1910, § 5293.
[65] Adams v. Higgins, 47 Okl. 323, 147 P. 1011.
[66] Steinbach v. Murphy, 78 P. 823, 70 Kan. 487.
[67] Glenn v. Payne, 48 Okl. 196, 149 P. 1151.

Wilson's Rev. & Ann. St. 1903, § 4624, fixing one year as the time within which an action may be revived in the names of the representatives or successors of the plaintiff, is not a mere limitation, but conditions the right to revive, and parties seeking to avail themselves of the benefits must comply with these terms. Glazier v. Heneybuss, 91 P. 872, 19 Okl. 316.

The fact that a district court, eight months after the time when an order reviving an action against the representatives or successors of a deceased defendant first could have been made, erroneously decided that it had no jurisdiction, will not excuse a failure to revive within one year, when no attempt was made to prosecute an order of revivor before the jurisdiction given was determined.[68]

Where executors of a plaintiff filed a motion to revive an action more than one year after the time when the order might have been made, the filing of a brief in the action by defendant was not a consent to a revivor.[69]

The period of limitation commences to run, in a case where an administrator is the proper party to be substituted, not until an administrator has been appointed.[70]

§ 319. Amendment to petition

When an action is revived in the name of the personal representative of the deceased plaintiff, the petition originally filed should be amended so as to allege, in an issuable form, his representative capacity, and the appointment or authority under which he proceeds; and, failing in this, no right to maintain the action is shown, and an objection to the introduction of any testimony under the petition should be sustained.[71]

An action to recover possession of real estate cannot be maintained, after the death of defendant, without amending the petition by substituting the widow and heirs of deceased as parties defendant.[72]

§ 320. Time of order

"An order to revive an action, in the names of the representatives or successor of a plaintiff, may be made forthwith, but shall not be made without the consent of the defendant, after the expiration of one year from the time the order might have been first made; but where the defendant shall also have died, or his powers have ceased, in the meantime, the order of revivor, on both sides, may be made in the period limited in the last section: Provided, that where the death of a party is not known or for other

[68] Glazier v. Heneybuss, 91 P. 872, 19 Okl. 316.
[69] Houghton v. Lannon, 40 P. 819, 1 Kan. App. 510.
[70] Rexroad v. Johnson, 45 P. 1008, 4 Kan. App. 333.
[71] Central Branch U. P. Ry. Co. v. Andrews, 9 P. 213, 34 Kan. 563.
[72] Douglass v. Galend, 76 P. 395, 69 Kan. 846.

unavoidable reasons the court may permit the revivor within a reasonable time thereafter." [73]

§ 321. Delay to revive

Where a party to an action has been dead for a period so long that the action cannot be revived without the consent of parties, which is not given, the action abates.[74]

Where defendant in error dies, and no proceedings were had to revive the case in the name of the administrators, and they refuse to consent to a revivor, the proceedings will be dismissed.[75]

§ 322. Vacation of order

The setting aside of an order of revivor for irregularities in procuring it was not a final determination of plaintiff administrator's right to revive, and left his motion to revive still pending. Where an administrator obtained an order of revivor, and defendant's motion to vacate such order was sustained, and motion for new trial on motion to vacate was overruled, and plaintiff then served notice of motion to revive action, the vacation of the order of revivor was not a final determination of the right to revivor, and left the motion to revive pending.[76]

§ 323. Objections and waiver

An objection that a case is not properly revived must be made before an appearance to the merits; such appearance constituting a waiver of any defect in the mode of revival.[77]

Where a corporation, pending a suit against it, was consolidated with other corporations, and plaintiff filed a pleading against the consolidated company designated as an "Amended Petition," but in the form of an original petition, and process was issued and served as in an original action, it was too late to object in the answer for the first time that there had not been a formal revivor and substitution; defendant having in the meantime demurred to the

[73] Rev. Laws 1910, § 5294.

An order to revive action cannot, without consent, be made at all more than one year from time it might first have been made. Zahn v. Obert, 60 Okl. 118, 159 P. 298.

[74] New Hampshire Banking Co. v. Ball, 48 P. 137, 57 Kan. 812.

[75] Helfenstein v. Sage, 58 P. 243, 9 Kan. App. 889.

[76] Chicago, R. I. & P. Ry. Co. v. Forrester (Okl.) 177 P. 593, 8 A. L. R. 163.

[77] Pioneer Telegraph & Telephone Co. v. Davis, 116 P. 432, 28 Okl. 783.

new pleading, and moved to strike it from the files, because it was for a new cause of action.[78]

§ 324. Action dismissed, when

"When it appears to the court, by affidavit, that either party to an action has been dead for a period so long that the action cannot be revived in the names of his representatives or successors without the consent of both parties, or, when a party sues or is sued as a personal representative, that his powers have ceased, the court shall order the action to be dismissed at the costs of the plaintiff." [79]

§ 325. —— At instance of defendant

"At any term of the court succeeding the death of the plaintiff, while the action remains on the docket, the defendant having given the plaintiff's proper representatives, in whose name the action might be revived, ten days' notice of the application therefor, may have an order to strike the order from the docket, and for costs against the estate of the plaintiff, unless the action is forthwith revived." [80]

§ 326. Trial

"When, by the provisions of the preceding sections, an action is revived, the trial thereof shall not be postponed by reason of the revivor, if the action would have stood for trial at the term the revivor is complete, had no death or cessation of powers taken place." [81]

§ 327. Death after judgment

"If either or both parties die after judgment, and before satisfaction thereof, their representatives, real or personal, or both, as the case may require, may be made parties to the same, in the same manner as prescribed for reviving actions before judgment; and such judgment may be rendered, and execution awarded, as might or ought to be given or awarded against the representatives, real or personal, or both, of such deceased party." [82]

[78] Curry v. Kansas & C. P. Ry. Co., 48 P. 579, 58 Kan. 6.
[79] Rev. Laws 1910, § 5295.
[80] Rev. Laws 1910, § 5296.
[81] Rev. Laws 1910, § 5297.
[82] Rev. Laws 1910, § 5299.

§ 328. Revivor of judgment—Forms

"If a judgment become dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment." [83]

MOTION FOR REVIVOR OF JUDGMENT

(Caption.)

Comes now the plaintiff, A. B., and respectfully represents and shows to the court that heretofore, to wit; on the ——— day of ———, 19—, the above-named plaintiff obtained judgment in this court against the defendant, C. D., for the sum of ——— dollars, to bear interest at the rate of ——— per cent. per annum from the date of said judgment, and the costs of said action taxed at ——— dollars, which said judgment is cited and made a part hereof.

That said judgment remains due and wholly unpaid; that by operation of law the said judgment has become dormant.

Wherefore plaintiff moves the court that said judgment be by the order of this court revived against the defendant, and for all other proper relief in the premises.

X. Y., Attorney for Plaintiff.

NOTICE OF MOTION FOR REVIVOR OF JUDGMENT

(Caption.)

To C. D., Defendant, and His Attorney of Record, G. H.:

You will take notice that the plaintiff has filed in the office of the court clerk of the above named court his motion for a revivor of a certain judgment therein referred to and cited, a copy of which motion is hereto attached, and that the same will be called up for hearing on said motion on the ——— day of ———, 19—, or as soon thereafter as the court can hear the same.

X. Y., Attorney for Plaintiff.

ORDER REVIVING JUDGMENT

(Caption.)

Now on this ——— day of ———, 19—, this cause coming on to be heard on the motion of A. B., plaintiff, to revive the judgment heretofore entered herein, the plaintiff appearing by his attorney, X. Y., and the said defendant, C. D., though duly served

[83] Rev. Laws 1910, § 5309.

with notice of the filing and hearing of said motion, came not but wholly made default; and the court, having heard the evidence, and being fully advised in the premises, finds:

That heretofore, to wit, on the ——— day of ———, 19—, the above-named plaintiff obtained judgment in this court against the defendant, C. D., for the sum of ——— dollars, to bear interest at the rate of ——— per cent. per annum from the date of said judgment, and the costs of said action taxed at ——— dollars; that said judgment is wholly unpaid, and that there is now due on said judgment from defendant to plaintiff the sum of ——— dollars; that said judgment has become dormant by elapse of time, and that more than five years has elapsed since the rendition of said judgment, and that less than one year has elapsed since said judgment became dormant.

It is therefore by the court ordered, adjudged, and decreed that said judgment be and the same is hereby revived for the sum of ——— dollars, with interest at ——— per cent. from ———, 19—, and for the costs included in said judgment, $———, and for costs herein.

———, Judge.

CHAPTER VII

LIMITATIONS

Sections
329–342. Article I.—Purpose, validity, and operation.
343–344. Article II.—Commencement of action.
345–360. Article III.—When statute begins to run.
361–378. Article IV.—Limitation periods.
379–391. Article V.—Suspension and tolling of statute.
392–397. Article VI.—Extension and waiver.
398–400. Article VII.—Contract limitations.

ARTICLE I

PURPOSE, VALIDITY, AND OPERATION

Sections
329. Purpose and validity of statutes.
330. What law governs—Foreign laws.
331. Construction and operation.
332. Retroactive operation.
333. Actions already barred.
334. As against state, municipality, or public officers.
335. Will contest.
336. As to defenses in general.
337. As to set-off or counterclaim.
338. Computation of time.
339. Bar absolute—Operation in general.
340. Debt of husband and wife.
341. Replevin.
342. Foreclosure.

§ 329. Purpose and validity of statutes

Statutes of limitations are statutes of repose, the object of which is to prevent fraudulent and stale actions from springing up after a great lapse of time.[1]

A statute operating to extend the time for suing on causes of action which were not barred at its passage, is not for that reason invalid.[2]

§ 330. What law governs—Foreign laws

"Where the cause of action has arisen in another state or country, between nonresidents of this state, and by the laws of the state

[1] Adams v. Coon, 129 P. 851, 36 Okl. 644, 44 L. R. A. (N. S.) 624.
[2] Schnell v. Jay, 46 P. 598, 4 Okl. 157.

or country where the cause of action arose, an action cannot be maintained thereon by reason of a lapse of time, no action can be maintained thereon in this state; and no action can be maintained in this state on any judgment or decree rendered in another state or country against a resident of this state, where the cause of action upon which such judgment or decree was rendered could not have been maintained in this state at the time the action thereon was commenced in such other state or country, by reason of lapse of time." [3]

This statute applies only where the cause of action arose between nonresidents of the state, which fact must be pleaded.[4] The words "when a cause of action has arisen" in a foreign state mean when the plaintiff has a right to sue the defendant in the courts of such foreign state, and have no reference to the origin of the transaction out of which the cause of action arose.[5]

[3] Rev. Laws 1910, § 4661.

The limitations of the state apply unless the statute of another state or country is pleaded. Perry v. Robertson, 150 P. 223, 93 Kan. 703.

An action to foreclose a mortgage given as security for the payment of notes executed by nonresidents of Kansas, payable in another state, and not barred by the five-year statute of limitations of Kansas will be controlled as to its limitation by the statute of the state where the mortgage and notes were executed and are payable. Croocker v. Pearson, 21 P. 270, 41 Kan. 410.

Under Civ. Code, § 21 (Gen. St. 1909, § 5614), where a cause of action accrues in another state between nonresidents of Kansas, and the obligor comes to Kansas before the action has been barred by the statute of the other state, the Kansas statute of limitations runs in his behalf, and unless interrupted within five years creates a bar. Perry v. Robertson, 150 P. 223, 93 Kan. 703.

Indian Territory.—Where note was executed and payable in Indian Territory, limitations prescribed by Mansfield's Dig. Ark. § 4483, and not the laws of Oklahoma Territory, extended over the state by Constitution, applied in an action in the state of Oklahoma. Patterson v. Rousney, 58 Okl. 185, 159 P. 636.

Ten-year limitation prescribed by Mansf. Dig. Ark. § 4487, applies to actions on judgment of United States court for Indian Territory. Davis v. Foley, 60 Okl. 87, 159 P. 646, L. R. A. 1917A, 187.

An action in the state court on a judgment rendered in a United States commissioner's court in the Indian Territory, is governed as to limitations by the laws in force when the judgment was rendered. Maine v. Edmonds, 58 Okl. 645, 160 P. 483.

Where lessee claimed possession of lands under 99-year lease from an Indian dated January, 1902, executed in Indian Territory, where defendant had been in adverse possession March, 1907, lessee's action to recover possession November, 1915, was barred by limitations, for Mansf. Dig. § 446, was in force in the territory in 1907, and the admission of the state did not operate to substitute a different statute. Bilby v. Diamond (Okl.) 174 P. 758.

[4] Croan v. Baden, 85 P. 532, 73 Kan. 364.

[5] Bruner v. Martin, 93 P. 165, 76 Kan. 862, 14 L. R. A. (N. S.) 775, 123 Am.

A cause of action on a contract made in Kansas barred by the statutes of Nebraska while defendant resided there, is not barred in Oklahoma, if not barred by the laws of Kansas or Oklahoma.[6]

The law of the forum ordinarily governs in respect to limitation of actions.[7]

§ 331. Construction and operation

Statutes of limitation, being statutes of repose, should be so construed as to advance the policy they are designed to promote.[8]

The enumeration by the Legislature of specific exceptions to a statute of limitations excludes all others.[9]

In construing a statute of limitations, it must, so far as it affects rights of action in existence when the statute is passed, be held, in the absence of a contrary provision, to begin when the cause of action is first subjected to its operation.[10]

Where a cause of action arose in another state, the statute of limitations does not begin to run against it until the debtor becomes a resident of Oklahoma.[11]

The right to sue to remove a cloud is a continuing one, to which the statute of limitations is not applicable.[12]

St. Rep. 172, 14 Ann. Cas. 39. A cause of action on a note cannot be maintained in Kansas where both plaintiff and defendant were nonresidents of Kansas when the cause of action accrued, and defendant resided in a foreign state until the cause of action was barred by the laws of that state. Id.; Keagy v. Wellington Nat. Bank, 69 P. 811, 12 Okl. 33; Stock Exch. Bank v. Wykes, 129 P. 1131, 88 Kan. 750.

[6] Doughty v. Funk, 84 P. 484, 15 Okl. 643, 4 L. R. A. (N. S.) 1029.

[7] Gaier & Stroh Millinery Co. v. Hilliker, 52 Okl. 74, 152 P. 410.

An action on contract is generally governed by statute of limitations of the forum, and not by the lex loci contractus or the lex domicilii. Shaw v. Dickinson (Okl.) 164 P. 1150.

An action to enforce the individual liability of a stockholder in a national bank is governed by the statute of limitations of the state in which the action is brought. Rankin v. Barton, 77 P. 531, 69 Kan. 629, judgment reversed, 26 S. Ct. 29, 199 U. S. 228, 50 L. Ed. 163.

[8] Atchison, T. & S. F. R. Co. v. Burlingame Tp., 14 P. 271, 36 Kan. 628, 59 Am. Rep. 578.

[9] Atchison, T. & S. F. Ry. Co. v. Atchison Grain Co., 75 P. 1051, 68 Kan. 585, 1 Ann. Cas. 639, modifying judgment 70 P. 933, on rehearing.

[10] Huber v. Zimmerman, 58 P. 737, 8 Okl. 573.

[11] Richardson v. Mackay, 46 P. 546, 4 Okl. 328.

The statute of limitations adopted from Nebraska for Oklahoma by the organic act did not begin to run, as against causes of action existing at its adoption, until that event. Schnell v. Jay, 46 P. 598, 4 Okl. 157.

[12] Cooper v. Rhea, 107 P. 799, 82 Kan. 109, 29 L. R. A. (N. S.) 930, 136 Am. St. Rep. 100, 20 Ann. Cas. 42.

A person cannot prevent the operation of the statute of limitations by delay in taking action incumbent upon him.[13]

§ 332. —— Retroactive operation

Statutes of limitations are matters of procedure and not of substantive "right," within the protection of Constitution, Schedule, § 1, preserving existing rights.[14]

A statute of limitation must, so far as affecting rights of action in existence when enacted, be held to begin when the right of action is first subjected to its operation.[15] Such statute is never given a retroactive operation, unless it appears clearly that such was the legislative intent.[16]

A repeal of the statute and the enactment of a new statute, have the effect of renewing actions that have not expired before the new statute takes effect.[17] But a statute of limitations which repeals a former statute on the same subject does not revive an action which has been barred by the former statute, if it is apparent from a reading of the later statute that such was not the legislative intent.[18]

[13] Glazier v. Heneybuss, 91 P. 872, 19 Okl. 316.

[14] Anderson v. Kennedy (Okl.) 152 P. 123. The two-year statute of limitations (Rev. Laws 1910, § 4657), existing when an action for breach of warranty and based on fraud was commenced, controlled, and not the three-year limitation prescribed by the Indian Territory statute (Carter's St. 1899, § 2945), which was in force when the cause of action accrued. Id.

[15] In re Mosher, 102 P. 705, 24 Okl. 61, 24 L. R. A. (N. S.) 530, 20 Ann. Cas. 209.

[16] Sess. Laws 1905, p. 328, c. 28, § 3, art. 7, providing that set-off or counterclaim shall not be barred by limitations until the claim of the plaintiff is so barred, only affects set-off or counterclaim existing at the time of its passage, and did not revive a set-off already barred by a former statute. Theis v. Board of Beaver County Com'rs, 97 P. 973, 22 Okl. 333.

[17] Huber v. Zimmerman, 58 P. 737, 8 Okl. 573.

St. 1893, c. 66, art. 3, § 18, providing for the time in which actions must be brought, renews the causes of action which have not expired under the 1890 statute of limitations, the legislature not having otherwise provided. Southgate v. Frier, 57 P. 841, 8 Okl. 435.

[18] Fuller & Fuller Co. v. Johnson, 58 P. 745, 8 Okl. 601.

Omission of Comp. Laws 1909, § 267, fixing a limitation of one year for commencement of proceedings for disbarment, from Revised Laws of 1910, which became effective May 16, 1913, did not toll the statute of limitations as to disbarment of attorney for acts committed from May to September, 1912, since act approved March 3, 1911 (Laws 1911, c. 39), adopting Revised Laws of 1910, provided that running of statute of limitations should not be affected thereby. In re Huddleston, 75 Okl. 48, 181 P. 711.

§ 333. —— Actions already barred

"Any right of action, which shall have been barred by any statute heretofore in force, shall not be deemed to be revived by the provisions of this article, nor shall the prior statutes of limitation be extended as to any cause of action which has accrued prior to the time this article shall take effect." [19]

§ 334. —— As against state, municipality, or public officers

Limitations do not run against the state unless expressly so provided by statute.[20]

Limitations do not run against the state where the state, though not the real party to the record, is the real party in interest.[21]

The maxim, "nullum tempus occurrit regi," extends to public rights, and applies to municipal corporations as trustees of the rights of the public, and protects from invasion the property of the municipality held for public use, no matter how lax the municipal authorities have been in asserting the rights of the public.[22]

But a county's action for money illegally paid in excess of the salary of its county attorney is subject to the statute of limitations.[23]

§ 335. —— Will contest

If one is prevented from contesting will at the probate thereof,

[19] Rev. Laws 1910, § 4653.

[20] White v. State, 50 Okl. 97, 150 P. 716; White v. State, 50 Okl. 104, 150 P. 718; State v. Dixon, 135 P. 568, 90 Kan. 594, 47 L. R. A. (N. S.) 905; State v. Moore, 136 P. 233, 90 Kan. 751; Board of Com'rs of Douglas County v. City of Lawrence, 171 P. 610, 102 Kan. 656; State v. School District, 8 P. 208, 34 Kan. 237.

[21] Anderson v. Ritterbusch, 98 P. 1002, 22 Okl. 761.

[22] Foote v. Town of Watonga, 130 P. 597, 37 Okl. 43.

The rule that statutes of limitations do not apply to actions by the state, unless a legislative intent that they shall do so is shown by express language or appears by the clearest implication, applies to subordinate political bodies, including municipal corporations with respect to any litigation to enforce governmental rights. City of Osawatomie v. Board of Com'rs of Miami County, 96 P. 670, 78 Kan. 270, 130 Am. St. Rep. 369. Where a county diverts to its own treasury a part of the money it has collected on taxes levied by city, no limitations run against an action by the city to recover the amount so wrongfully withheld. Id.

[23] Board of Com'rs of Woodward County v. Willett, 49 Okl. 254, 152 P. 365, L. R. A. 1916E, 92; Rev. L. § 4657.

he may do so within one year after disability is removed, after which time the right is lost.[24]

The statutes relieve an infant of the diligence required of adults under the prior section to contest the probate of a will within one year, or show that the evidence relied on was discovered since the probate of the will.[25]

§ 336. —— As to defenses in general

Statutes of limitation are not applicable to mere defenses.[26]

§ 337. —— As to set-off or counterclaim

A counterclaim pleaded as a defense, or a set-off pleaded for the purpose of liquidating the whole or a part of plaintiff's claim, is not barred by the statutes of limitations until the claim or the demand of the plaintiff is barred,[27] unless defendant's claim was completely barred before the claim of plaintiff was created.[28]

[24] Cooper v. Newcomb (Okl.) 174 P. 1029; Rev. Laws 1910, §§ 6219, 6225.

[25] Scott v. McGirth, 139 P. 519, 41 Okl. 520.

[26] Muckenthaler v. Noller (Kan.) 180 P. 453. Code Civ. Proc. § 24 (Gen. St. 1915, § 6914), providing that a barred right of action cannot be used as a defense, applies to set-off or counterclaim or affirmative relief, and not to matters of pure defense. Id. An instrument or contract upon which an action or right is based may be attacked for fraud after time prescribed by Code Civ. Proc. § 17 (Gen. St. 1915, § 6907), if attacking party does so merely for defense, and seeks no affirmative relief. Id. Where verified answer admitted defendants' signature on note in suit to be genuine, and alleged that their signatures were obtained by fraud and asked no affirmative relief, a reply pleading statute (Code Civ. Proc. § 17 [Gen. St. 1915, § 6907]) limiting actions for relief for fraud to two years after its discovery is bad as directing limitation to a matter of pure defense. Id.

[27] Stauffer v. Campbell, 30 Okl. 76, 118 P. 391; Rev. Laws 1910, § 4662; Cooper v. Gibson (Okl.) 170 P. 220; Advance Thresher Co. v. Doak, 129 P. 736, 36 Okl. 532.

Code Civ. Proc. § 102 (Gen. St. 1909, § 5695), allowing cross-demands, notwithstanding the statute of limitations, held not applicable to a set-off for damages, where a special contract prescribed conditions precedent to a claim for damages, and that a breach thereof should bar recovery. Chicago, R. I. & P. Ry. Co. v. Theis, 152 P. 619, 96 Kan. 494.

Under Civ. Code, § 102 (Gen. St. 1909, § 5695), held, that the statute of limitations was not a bar to a cross-demand and counterclaim setting up, in a bank's action on notes, false representations of plaintiff's cashier, false charges against defendant, and failure to credit defendant with deposits. Drovers' State Bank v. Elliott, 154 P. 255, 97 Kan. 64.

Under Code Civ. Proc. § 102 (Gen. St. 1909, § 5695), where a defendant wrong-

[28] O'Neil v. Eppler, 162 P. 311, 99 Kan. 493.

While a set-off barred by limitations may be legally pleaded as a set-off, an original action within one year after such set-off is pleaded cannot be maintained on such set-off, although the set-off is not disposed of upon its merits.[29]

§ 338. Computation of time

Except where a different intention is manifest, in computing time from a certain date the first day is to be excluded and the last included.[30]

A day, in legal consideration, is punctum temporis; fractions of a day being disregarded in computations which include more than one day and involve no question of priority.[31]

§ 339. Bar absolute—operation in general

"When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense, except as otherwise provided with reference to a counterclaim or set-off." [32]

The statute of limitations can be pleaded only as a defense, and cannot be made the basis of a claim for affirmative relief.[33]

Where a cause of action is barred against an official, it is barred against the sureties upon his official bond.[34]

Book accounts which are barred by the statute of limitations are not legal, but moral, obligations.[35]

fully withholding land is allowed a claim for mortgages paid by him, plaintiff, notwithstanding the statute of limitations, may set up a claim for the reasonable rental value. New v. Smith, 155 P. 1080, 97 Kan. 580.

In action for shortage in land conveyed to plaintiff by defendant, wherein defendant counterclaimed for shortage in stock of merchandise traded to him for the land, Gen. St. 1915, § 6994, prevented application of statute of limitations to counterclaim. McKenna v. Morgan, 102 Kan. 478, 170 P. 998.

[29] Delzell v. Couch (Okl.) 173 P. 361.

[30] Baker v. Hammett, 100 P. 1114, 23 Okl. 480.

In computing the two-year period within which action to recover usurious interest paid must be brought under United States Usury Statute (U. S. Comp. St. § 9759) the first day of the period is excluded and the last day included. First Nat. Bank v. Drew (Okl.) 169 P. 1092.

[31] Franklin v. State, 9 Okl. Cr. 178, 131 P. 183.

[32] Rev. Laws 1910, § 4664.

[33] Corlett v. Mutual Ben. Life Ins. Co., 55 P. 844, 60 Kan. 134; Burditt v. Burditt, 64 P. 77, 62 Kan. 576; Johnson v. Wynne, 67 P. 549, 64 Kan. 138.

[34] Allen v. State, 51 P. 572, 6 Kan. App. 915; Ryus v. Gruble, 3 P. 518, 31 Kan. 767.

[35] Balmer v. Long, 104 Kan. 408, 179 P. 371.

On a petition in an action for procuring money by fraudulent representations respecting worthless patent-right territory purchased by plaintiff, he could recover for the fraud, though the question of value was barred by limitations.[36]

The vendee's title under a contract of purchase will not be quieted against the vendor where the consideration has not been paid, though the vendor has failed to enforce payment within the period of limitations.[37]

Though cause of action on a judgment is barred by limitations, costs paid by the judgment creditor in the action within five years, owing to the failure of the judgment debtor to pay the same, are not barred.[38]

While an action to enforce an arbitration award between the owner and the person holding realty as security for a debt is barred after five years, a suit to quiet title to the realty on the ground that the debt has been paid is not barred.[39]

A cause of action against a corporation, which accrues on the suspension of business by the corporation, and against which the statute of limitation will run within three years thereafter, will become barred also as to a stockholder on his individual liability, notwithstanding the creditor cannot commence an action against the stockholder until after the expiration of one year from the time the corporation suspended business.[40]

Where, in an action for reconveyance of property originally conveyed to indemnify defendant on a recognizance, an allegation in the petition that six years had elapsed since judgment was obtained on the recognizance is not pleading the statute of limitations as a weapon of attack, but as limiting defendant's legal liability on the judgment.[41]

§ 340. Debt of husband and wife

Where a mortgage on a homestead, the title to which is in the wife, is executed by the husband and wife to secure their note,

[36] Berhenke v. Penfield, 94 Kan. 532, 146 P. 1187.
[37] Berkley v. Idol, 136 P. 923, 91 Kan. 16.
[38] City of Topeka v. Ritchie, 102 Kan. 384, 170 P. 1003.
[39] Doty v. Shepard, 139 P. 1183, 92 Kan. 122, rehearing denied 141 P. 1013, 92 Kan. 1041.
[40] Pacific Elevator Co. v. Whitbeck, 64 P. 984, 63 Kan. 102, 88 Am. St. Rep. 229.
[41] Morris v. Hulme, 81 P. 169, 71 Kan. 628.

limitations will not bar foreclosure, so long as an action to recover the debt may be maintained against the husband, though such an action is barred against the wife.[42]

The refusal to foreclose a mortgage given to secure a note of a husband and wife, for the reason that the title to the mortgaged land was in her and that the debt as to her was barred, is error.[43]

In an action commenced against a husband on a tax deed for the recovery of land, where, after the statute of limitations has run on the deed, the wife on her own motion is made a party to the action in order to resist the claim of plaintiff for a tax lien, she can plead the statute in her behalf, although the action was brought against her husband within the statutory time.[44]

§ 341. Replevin

Limitations are not a bar to a recovery in replevin by a mortgagee of the possession of the mortgaged property before the statute ran on the note, though the case was not tried until after the right of action had been barred on the note.[45]

§ 342. Foreclosure

In an action to foreclose, the same limitation applies to the note as to the mortgage, and if an action is maintainable on the note, it is maintainable on the mortgage.[46]

Where a grantee, who has assumed a mortgage debt, conveys the land, an action to enforce the mortgage lien is not barred until action against the debtor is barred.[47]

A suit to foreclose a mortgage having been brought within five years from maturity, the statute of limitations cannot be pleaded against it by the holder of a tax title, who intervenes after the five years have run, and asks that the title be quieted in him.[48]

[42] Investment Securities Co. v. Manwarren, 68 P. 68, 64 Kan. 636.

[43] Cooper v. Haythorn, 71 P. 277, 66 Kan. 91.

Where, on foreclosure to secure a joint and several note executed by husband and wife, the court find that limitations have run against the wife, but as to the husband the note is in force, it is error to award judgment against the husband alone, and refuse to foreclose the mortgage, because the property is that of the wife. Cooper v. Haythorn (Kan.) 68 P. 1069.

[44] Richards v. Tarr, 22 P. 557, 42 Kan. 547.

[45] McDonald v. Hutchinson Wholesale Grocer Co., 68 P. 1083, 65 Kan. 17.

[46] Kirk v. Andrew, 97 P. 797, 78 Kan. 612.

[47] Hendricks v. Brooks, 101 P. 622, 80 Kan. 1, 133 Am. St. Rep. 186.

[48] Ordway v. Cowles, 25 P. 862, 45 Kan. 447.

The holder of a tax title against mortgaged property cannot invoke limitations as a defense to a suit to foreclose.[49]

Where a guarantor of payment of a note secured by mortgage after purchase of the mortgaged premises at a tax sale thereof assigned the tax sale certificate, its assignee was its successor in relationship to the land, in privity with it, and could plead the defense of statute of limitations the same as it might have done.[50]

Plaintiff, in an action to quiet title, may interpose the bar of limitations against a defendant mortgagee seeking to foreclose a mortgage lien thereon.[51]

A mortgage securing a note must stand or fall with the note, and, if the note cannot be legally collected, the mortgage cannot be enforced.[52]

ARTICLE II

COMMENCEMENT OF ACTION

Sections
343. When action commenced.
344. Amendment.

§ 343. When action commenced

"An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a co-defendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days." [53]

[49] Gibson v. Rea, 140 P. 893, 92 Kan. 262; Gibson v. Ast, 94 P. 801, 77 Kan. 458.

[50] Cones v. Gibson, 94 P. 998, 77 Kan. 425, 16 L. R. A. (N. S.) 121.

[51] Hogaboom v. Flower, 72 P. 547, 67 Kan. 41.

[52] Vanselous v. McClellan, 57 Okl. 742, 157 P. 923.

[53] Rev. Laws 1910, § 4659; English v. T. H. Rogers Lumber Co. (Okl.) 173 P. 1046.

Under St. 1890, c. 70, art. 7, § 1, providing that a civil action shall be com-

Where the petition and affidavit for summons by publication and affidavit for attachment are filed, and order of attachment is issued and served immediately, though first publication was not made until later, the action was commenced, provided summons by publication was later duly completed.[54]

Where a petition is filed and summons issued thereon, though service is not obtained, but an alias summons is issued and properly served within 60 days, the action will be deemed to have been commenced when the petition was filed;[55] but where an alias summons was issued and served more than 60 days after confession of a motion to set aside a summons, the action was not begun until the date of the alias summons.[56]

Where certain defendants seek to enforce demands against a codefendant, the action will be deemed commenced as to such demands at the time the answers setting them up are filed.[57]

An action prematurely brought prevents the running of the statute of limitations.[58]

§ 344. —— Amendment

An amendment of the petition ordinarily relates back to the date of the commencement of the action,[59] particularly if the amendment

menced by filing in the office of the proper clerk a complaint and causing a summons to issue thereon, and the action shall be deemed commenced from the time of issuing summons, where the statute of limitations was two years, and the complaint was filed September 30, 1890, and summons issued April 5, 1892, and served the same day, the action was not barred by the two years' limitation at the time it was commenced. Schnell v. Jay, 46 P. 598, 4 Okl. 157. Under the express provision of Comp. St. Neb. 1889, Code Civ. Proc. § 19, an action was deemed commenced at the date of the summons which was served. Id. Under St. Okl. 1890, c. 70, art. 7, § 1, adopted from Indiana, a civil action was deemed commenced from the time of issuing summons. Id.

Actions for forcible entry and detainer are not to be deemed commenced until summons has issued, regardless of the date when the complaint was verified, under St. 1893, p. 891, c. 67, art. 2, § 9, providing that actions before justices are commenced by summons, or by appearance and agreement of the parties without summons. Greenameyer v. Coate, 72 P. 377, 12 Okl. 452.

[54] Richardson v. Carr (Okl.) 171 P. 476.

[55] German Ins. Co. v. Wright, 49 P. 704, 6 Kan. App. 611.

[56] Brock v. Francis, 131 P. 1179, 89 Kan. 463, 45 L. R. A. (N. S.) 756.

[57] German Fire Ins. Co. v. Bullene, 33 P. 467, 51 Kan. 764.

[58] St. Louis & S. F. Ry. Co. v. Kinman, 58 P. 1037, 9 Kan. App. 633.

[59] An amendment of a petition substituting one party for another as plaintiff relates to the institution of the action and suspends limitations as to the

is formal and not substantial,[60] though it involves the bringing in of new parties,[61] unless it sets up a new cause of action,[62] in which case, such new cause of action is barred.[63]

substituted plaintiff from the time the action was begun and not from the date of the amendment. Harlan v. Loomis, 140 P. 845, 92 Kan. 398.

Where a petition has been filed within proper time, the cause of action was not barred, though an amended petition not changing the cause of action was not filed until after two years from the discovery of the fraudulent acts complained of. Z. J. Fort Produce Co. v. Southwestern Grain & Produce Co., 108 P. 386, 26 Okl. 13.

Where a cross-complaint filed within the period of limitations is not signed by the attorneys until after the filing of a trial amendment, such amendment will relate back to the filing of the cross-complaint, and action is not barred by limitations. Anthony Inv. Co. v. Arnett, 64 P. 1024, 63 Kan. 879.

A cause of action is not barred because an amendment of the petition was filed after the statute had run against the action, if the original petition was filed in time. Culp v. Steere, 28 P. 987, 47 Kan. 746.

Where, in an action on a note, the court substituted the real owner of the note as plaintiff in place of the payee thereof, such substitution did not change the cause of action; and, since the amendment related back to the commencement thereof, the running of the statute of limitations was arrest-

[60] Defendant was legatee and executor of testator's will, and the testator's sole heir at law filed a petition to set it aside within two years from the probate thereof, to which a demurrer was sustained because defendant was named as executor neither in the caption nor the body of the petition, although it clearly appeared from the averments of the petition that the suit was against him both in his own right and as executor; and over two years after the probate of the will an amended petition was filed, in which defendant was named as executor. Held, that the action was not barred by the two-years statute of limitations, since the amendment was formal and not substantial. Hoffman v. Steffey, 61 P. 822, 10 Kan. App. 574.

[61] In an action to contest a will, a devisee who was friendly to contestant could be made a party to the suit two years from the time the will was probated without affecting the statute of limitations. Lyons v. Berlau, 73 P. 52, 67 Kan. 426.

[62] In an action against a railroad company for appropriating a street in front of plaintiff's lots by laying its track therein, stopping his ingress and egress, damages were claimed as for a quasi condemnation by the wrongful use of the street. After the action had been pending more than 10 years, plaintiff by amendment sought to bring in another railway company as defendant, charging it with conspiring with the first to appropriate the street. Held, that recovery against the new defendant was barred by limitations. Anderson v. Atchison, T. & S. F. R. Co., 80 P. 946, 71 Kan. 453.

Amended cross-petition to foreclose mechanic's lien on lot on which building was erected did not set up new cause barred by limitations where the original cross-petition sought foreclosure of lien against same lot and adjoining lot. Moline Elevator Co. v. Loewen Real Estate & Investment Co., 57 Okl. 478, 157 P. 99.

[63] See note 63 on page 210.

Where an original petition states no cause of action whatever, it will not arrest the running of limitations, and an amendment made after the bar of the statute is complete must be treated as

ed from the commencement of the action. Service v. Farmington Sav. Bank, 62 P. 670, 62 Kan. 857.

An amendment to a petition seeking recovery on a fire policy, whereby the facts showing the fraud and mistake in description were set forth, and praying reformation and recovery, held not to change the cause of action, and hence limitations did not run from the time of amendment. Phenix Ins. Co. of Brooklyn, N. Y., v. Ceaphus, 51 Okl. 89, 151 P. 568.

Where plaintiff sued on a note before it was barred by limitations, an amendment of the complaint after limitations had run merely for the purpose of correcting a recital that a copy of the note was attached to the complaint as Exhibit A so as to allege that the original instead of a copy was attached did not state a new cause of action, and was therefore not barred. Bradley v. Pinney, 93 P. 585, 77 Kan. 763.

Where an action to quiet title as against a tax deed was brought within the prescribed five years, and after the expiration of that period, by stipulation, the form of action was changed to ejectment, and amended pleadings were filed, and the proceedings thereafter were in ejectment, it did not operate as a dismissal of the suit to quiet title and the commencement of an ejectment. Hillyer v. Douglass, 42 P. 329, 56 Kan. 97.

Where, in a suit for conversion, it appears that defendant did not in fact sell the property, but it was sold under his direction, plaintiff is permitted to amend his petition, so as to charge defendant with conversion, and such amendment is made more than five years after the cause of action accrued, still, as the amendment was in fact made and as the plaintiff's action was commenced less than two years after the original cause of action accrued, there is no room for claiming that the cause on which the plaintiff recovered was barred at the time by the operation of any statute of limitations. Emporia Nat. Bank v. Layfeth, 64 P. 973, 63 Kan. 17.

Wrongful death.—Amendment of petition to allow widow of one killed while under federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665) so as to permit her to sue as his personal representative, instead of personally, was not commencement of new cause of action for purpose of applying two-year limitation provided by act. Missouri, K. & T. Ry. Co. v. Lenahan (Okl.) 171 P. 455.

Filing of an amendment, under Rev. Laws 1910, § 4790, adding the names of brothers and sisters as plaintiffs, in an action for death, held to relate back to the commencement of the action by the mother so as to defeat a plea of the statute of limitations, section 4692. Motsenbacker v. Shawnee Gas & Electric Co., 49 Okl. 304, 152 P. 82, L. R. A. 1916B, 910.

In action for wrongful death under Rev. Laws 1910, §§ 5281, 5282, by father of deceased child, where more than two years after death he amended by joining mother of deceased as other next of kin, the amendment related back to commencement of suit and arrested statute of limitations. Cowan v. Atchison, T. & S. F. Ry. Co. (Okl.) 168 P. 1015.

Petition, in a widow's action for the negligent killing of her husband by a train, held sufficient to constitute a commencement of the action within the statute of limitations, though it failed to allege that deceased was a

filed at the time the amendment is made, and a cause of action stated therein cannot escape the bar of the statute.[64]

nonresident and that by the laws of the state of his residency the widow was the only person entitled to bring the action. Robinson v. Chicago, R. I. & P. Ry. Co., 133 P. 537, 90 Kan. 426.

Even after the expiration of the time within which an action for wrongful death may be brought, the petition in such an action may be amended by setting out the existence of a statute of the state where the wrongful act occurred, which authorizes recovery. Cunningham v. Patterson, 132 P. 198, 89 Kan. 684, 48 L. R. A. (N. S.) 506.

If, after a widow has brought an action for the death of her husband, she is appointed administratrix and amends the petition, her action as administratrix is not barred by the two-year statute of limitations. Mott v. Long, 132 P. 998, 90 Kan. 110.

Even after the expiration of the time within which an action for wrongful death may be brought, the petition therein may be amended by setting out the existence of a statute of the state where the wrongful death occurred which authorizes recovery by plaintiff. Robinson v. Chicago, R. I. & P. Ry. Co., 133 P. 537, 90 Kan. 426.

Ejectment.—A petition in ejectment may be amended so as to change the description of the property sought to be recovered where there was no contention that limitations had expired between the beginning of the action and the amendment. Hinnen v. Artz, 163 P. 141, 99 Kan. 579.

Damages.—An amendment of a petition in an action for damages, by adding the name of a party plaintiff, made more than two years after the cause of action accrued, relates back to the date of the commencement of the action, and the cause of action is not for that reason barred by limitations. Hucklebridge v. Atchison, T. & S. F. Ry. Co., 71 P. 814, 66 Kan. 443.

An amended petition, which merely enlarged the claim for damages, held not demurrable because it showed that the claim was barred, since the amended petition would relate back to the original filing and defeat the operation of the statute. Armstrong v. May, 55 Okl. 539, 155 P. 238.

Under Rev. Laws 1910, § 4970, amendment of complaint for personal injuries after reversal, and after five years from accrual of cause of action, to allege negligent failure to provide safe fellow servants, was permissible. E. Van Winkle Gin & Machine Works v. Brooks, 53 Okl. 411, 156 P. 1152.

A petition alleging negligence in general terms may be amended, so as to set forth definitely the alleged negligence, although the period of limitations has expired when the amendment is made. Missouri Pac. Ry. Co. v. Moffatt, 55 P. 837, 60 Kan. 113, 72 Am. St. Rep. 343.

The petition, in a servant's personal injury action against a railway company, charged that defendant's servants negligently pushed certain cars negligently fastened together with a chain, so as to make them dangerous to handle and use, all of which was known to defendant, and while so pushing and switching said cars negligently so operated the cars as to throw plaintiff off of one of said cars, etc. An amended petition charged that defendant negligently fastened two cars together with a chain, making the

[64] Missouri, K. & T. Ry. Co. v. Bagley, 69 P. 189, 65 Kan. 188, 3 L. R. A. (N. S.) 259; Powers v. Badger Lumber Co., 90 P. 254, 75 Kan. 687.

Though the statute provides that an action to foreclose a lien shall be brought within one year from the time of its filing, an

cars dangerous; that defendant had knowledge of such defective coupling; that plaintiff had no knowledge of the dangerous condition of the cars, and was injured by a movement of the cars directed by defendant without proper regard for safety. Held, that the first petition charged negligence in the coupling of the cars, which was made the basis of the charge of negligence in the amended petition, so that the latter did not set up a new cause of action; and hence the cause of action set up in the amended petition was not barred by limitation. Taylor v. Atchison, T. & S. F. Ry. Co., 68 P. 691, 64 Kan. 888.

Where breaches of building contract constituted only a single cause of action, an amendment to petition more than five years after completion of work setting up additional items furnished under contract was not barred by statute of limitations. Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co., 172 P. 527, 102 Kan. 799.

A petition alleging that defendant unlawfully carried away stone from land owned by plaintiff, and asking treble damages therefor, sufficiently states a cause of action under Gen. St. 1909, § 9692, authorizing treble damages against one who carries away stone from land in which he has no interest, so that after the lapse of limitations it may be amended to accord to the language of that act. Fox v. Turner, 116 P. 233, 85 Kan. 146; Green v. Same, 116 P. 234, 85 Kan. 877.

[63] Where an amendment sets forth a new cause of action, limitation may be pleaded to the new matter. Thompson v. Beeler, 77 P. 100, 69 Kan. 462; Butt v. Carson, 48 P. 182, 5 Okl. 160.

Amendment to count of petition in action for malicious prosecution to allege defendants' false testimony resulting in a conviction brought in a new cause of action, and, when filed more than one year after cause of action accrued, it was barred by Code Civ. Proc. § 17, subd. 4 (Gen. St. 1915, § 6907, subd. 4). Smith v. Parman, 172 P. 33, 102 Kan. 787.

Where plaintiff, by amendment, sets up no new matter or claim, but merely restates more specifically the cause of action set out in original declaration, there is no new suit, and statute of limitation will not avail for period between original and amended pleading. Continental Ins. Co. v. Norman (Okl.) 176 P. 211. Where original declaration states a cause of action imperfectly and thereafter the defect is corrected by an amended declaration, the plea of statute of limitations will relate to time of filing of original declaration. Id.

An action on a note containing an indorsement of a payment, commenced within five years after date of the indorsement, held barred by limitations, where the petition did not allege payment to remove the apparent bar under Code Civ. Proc. § 23 (Gen. St. 1909, § 5616), and the amended petition which made such allegation was not filed until more than five years after the date of the indorsement. Liphart v. Myers, 156 P. 693, 97 Kan. 686.

In an action against a township for injuries from a defective highway, a petition failing to allege the notice essential to recovery cannot be cured by amendment after expiration of the limitation period. Higman v. Quindaro Tp., 139 P. 403, 91 Kan. 673.

Where an action is brought on two notes, and during the trial it is dis-

action is brought in time if brought within the year, though the original contractor, which by law must be made a party, is not made a party until after such year.[65]

missed as to one of them without prejudice, and afterwards plaintiff amends his petition, and claims the same amount as balance due on a settlement, and the pleadings show the settlement occurred more than three years before the petition was amended, the amendment does not relate back to the time of beginning suit, and the claim is barred by the three-years statute of limitations. Parsons Water Co. v. Hill, 26 P. 412, 46 Kan. 145.

Where a servant commenced his action against a railroad company for injuries by the failure of defendant in its common-law duties towards him, and more than two years after the injury filed an amended petition containing an additional cause of action, that the injury was the result of the negligence of a fellow servant, for which defendant would be liable only under Laws 1874, c. 93, the statute of limitations, as applied to such new cause, treats the action as commenced when the amendment was filed. Atchison, T. & S. F. R. Co. v. Schroeder, 44 P. 1093, 56 Kan. 731.

Plaintiff, whose daughter was killed through the alleged negligence of defendants brought an action in which he stated a common-law liability for loss of services of his daughter, but the averments were wholly insufficient to constitute a statutory liability for her death. More than two years after the negligent injury, he asked and obtained leave to amend his petition, so as to state a cause of action for the recovery of damages for death under Civ. Code, § 422. Held, that the amendment constituted a new cause of action which did not relate back to the commencement of the action, so that the cause of action set up in the amendment was barred by limitations. City of Kansas City v. Hart, 57 P. 938, 60 Kan. 684; Simpson v. Same, Id.

Amendments which only make more specific the averments of the original petition, or state the wrong suffered or the right relied on, are ordinarily permissible, and relate back to the beginning of the action, and, where an amendment sets forth a new and different cause of action, limitations continue to run until the amendment is filed. Union Pac. R. Co. v. Sweet, 96 P. 657, 78 Kan. 243. In an action to recover damages for the negligent setting out of a fire which destroyed plaintiff's trees, the original petition alleged that the fire was set out at a certain time and place, and, after limitations had expired, plaintiff obtained leave to amend his petition to aver that the damage resulted from a different fire started five miles distant from the one originally relied on. Held, that the amendment set out a distinct tort, and a new cause of action, on which a recovery was barred by limitations. Id.

Where, in an action for injuries to a licensee, there was no allegation that defendant was negligent in failing to light its depot platform, the petition could not be amended so as to charge such failure as a ground of negligence after limitations had run against it. Elrod v. St. Louis & S. F. R. Co., 113 P. 1046, 84 Kan. 444.

Where an action is brought in Kansas, based upon a particular section of the Missouri statute, and afterwards an amended petition is filed, alleging a right of action under another section of the same statute, and the time in which the plaintiff had a right to bring said action expired before the amended petition was filed, the bar of the statute of limitations is not tolled by the filing of the first petition. Walker v. Hester, 59 P. 662, 9 Kan. App. 201.

[65] Western Sash & Door Co. v. Heiman, 68 P. 1080, 65 Kan. 5.

In an action to enforce a mechanic's lien, service of summons on the owner within the period of limitation prescribed by statute for the commencement of such an action does not preserve the lien as against other incumbrancers who are not made parties to such an action within the period of limitation.[66]

The filing of a petition against one reciting facts which would authorize an action against one not made a defendant will not toll limitations as to latter if he is not made defendant until the statute has run.[67]

ARTICLE III

WHEN STATUTE BEGINS TO RUN

Sections

345. Accrual of right or defense—In general.
346. Real property.
347. Personal property.
348. Contracts in general.
349. Continuing contracts.
350. Severable contracts and installments.
351. Bonds.
352. Covenants—Mortgage deed.
353. Municipal warrants.
354. Torts.
355. Guaranty.
356. Malfeasance in office.
357. Statutory liability.
358. Equitable actions.
359. Conditions precedent.
360. Trusts.

§ 345. Accrual of right or defense—In general

The statute of limitations does not begin to run until an obligation is due,[68] but whenever one party to a contract may rightfully sue another thereon, a cause of action has accrued, and the statute begins to run.[69]

Where, before the time fixed for performance, one of the parties

[66] Wood v. Dill, 43 P. 822, 3 Kan. App. 484.

[67] Garrity v. State Board of Administration of Educational Institutions, 162 P. 1167, 99 Kan. 695.

[68] Henshaw v. Smith, 171 P. 616, 102 Kan. 599.

[69] Patterson v. Bonner (Okl.) 175 P. 826; United States Fidelity & Guaranty Co. v. Fidelity Trust Co., 49 Okl. 398, 153 P. 195.

to a contract for the exchange of lands repudiates it, the other may immediately commence an action for specific performance.[70]

§ 346. —— Real property

The right of action to recover real property does not accrue until there is a right vested in plaintiff and an adverse claim asserted or perfected.[71]

[70] Parks v. Monroe, 161 P. 638, 99 Kan. 368.

[71] Limitations begin to run against a widow claiming under Gen. St. 1901, § 2510, providing that one-half in value of all the realty in which a husband at any time during marriage had a legal or equitable interest which has not been sold on judicial sale, and is not necessary for payment of debts, and of which the wife has made no conveyance, shall, under the direction of the probate court, be set apart by the executor as her property, upon the death of her husband, if she survives him, when the husband makes a conveyance of such property without the wife joining therein and the grantee takes adverse possession thereof. Poole v. French, 111 P. 488, 83 Kan. 281.

In an action of ejectment, both parties claimed title under tax deeds. The action was commenced more than nine years after the last tax deed (defendant's) was recorded. Held, that the action was barred by the statute of limitations. Campbell v. Stagg, 15 P. 531, 37 Kan. 419.

In an action against the original owner for the possession of lands by the purchaser at a judicial sale, where it is shown that the lands remained unoccupied for more than five years after the recording of the sheriff's deed given to said purchaser at such sale, such original owner is barred from setting up his title as a defense to said action. English v. Woodman, 20 P. 262, 40 Kan. 412.

When two grantees of a tax title holder are in the actual possession, each of the one undivided half of the land sold for taxes before the tax deed has been of record for five years, the statute of limitations does not operate in favor of either in an action between them for partition. Hamilton v. Redden, 24 P. 76, 44 Kan. 193.

Where a mortgagee takes possession of real estate under an agreement with the mortgagor to collect the rents and apply them on the debt, limitations will not begin to run against the mortgagor's right to redeem until the mortgagee, with notice to the mortgagor, asserts title in himself. Hunter v. Coffman, 86 P. 451, 74 Kan. 308.

Where minor remainderman executed deed to life tenant in 1898 and disaffirmed it in 1901 after death of life tenant, her action in 1914 to recover property from life tenant's husband who claimed adverse possession from 1898 was not barred by Code Civ. Proc. §§ 15, 16, since her cause of action did not accrue until death of life tenant. Ralph v. Ball, 164 P. 1081, 100 Kan. 460.

The statute of limitations held not to run against an action to have a deed declared a mortgage while the grantor was making repeated demands for a reconveyance, and the grantee was promising to comply therewith. Clark v. Shoesmith, 139 P. 426, 91 Kan. 797.

Where town lots were sold on March 16, 1897, at a foreclosure sale, which was confirmed June 7, 1897, and a sheriff's deed issued which was record-

Where a mortgagee enters mortgaged premises under claim of title, and notice of possession and adverse claim is brought home to the mortgagor or his successor, the statute of limitations is set in motion as to an action to redeem.[72]

The right of action in a forcible entry and detainer case between adverse claimants of a homestead accrues when the contest is finally adjudicated in the land office.[73]

§ 347. —— Personal property

As to lost personal property, or as to such property in the hands of a thief, the statute of limitations begins to run from the wrongful taking of possession, if there is no fraud or attempt to conceal or remove from the court's jurisdiction.[74]

§ 348. —— Contracts in general

Limitations did not begin to run against an attorney's right to a fee, contingent on his collection of a debt owed to the client, until the collection had been made.[75]

ed August 11, 1897, held, that a suit brought August 1, 1911, was barred by the five-year limitations prescribed by Rev. Laws 1910, § 4655. Group v. Jones, 44 Okl. 377, 144 P. 377.

[72] Turk v. Page (Okl.) 174 P. 1081.

[73] Cope v. Braden, 67 P. 475, 11 Okl. 291.

[74] Adams v. Coon, 129 P. 851, 36 Okl. 644, 44 L. R. A. (N. S.) 624; Torrey v. Campbell (Okl.) 175 P. 524. When personal property which has been lost or stolen is in notorious possession by one in whose possession it is found for two years from date of wrongful taking or possession, owner's right of action therefor is barred by limitations. Id.

Limitations as to personalty in thief's hands do not begin to run until the owner has an opportunity to assert his title. Chilton v. Carpenter, 78 Okl. 210, 189 P. 747.

Limitations (Mansf. Dig. § 4478 [Ind. T. Ann. St. 1899, § 2945]) as to personal property stolen run in favor of an innocent purchaser against the true owner from the time the property is taken possession of, and are a bar when the same has been held openly for three years. McGehee v. Alexander, 127 P. 480, 33 Okl. 699.

Comp. Laws 1909, § 3550 (Sess. Laws 1895, c. 39; Wilson's Rev. & Ann. St. 1903, § 4216), provides that actions for specific recovery of personalty must be brought within two years. Held, that the statute as to personal property, though stolen, when held in good faith and for value, openly and notoriously runs in favor of such adverse possession, so as to bar a recovery by the true owner after expiration of two years, and after the statute begins to run, such subsequent purchaser may tack on such prior adverse holding to complete the bar. Shelby v. Shaner, 115 P. 785, 28 Okl. 605, 34 L. R. A. (N. S.) 621.

[75] Joyce v. Miami County Nat. Bank, 136 P. 232, 90 Kan. 745.

When time fixed for payment of oral obligation is uncertain, but its maturity may arrive within one year and promisee has fully performed his part of obligation, the statute of limitations does not begin to run until obligation matures.[76]

A real estate agent's commissions, consisting of the profits arising from an exchange of his principal's land, were earned, and the right to commissions accrued, when the principal accepted a purchaser on terms satisfactory to him, and limitations began to run against the agent from such time.[77]

An action for money had and received is not barred, where it appears that the money was not received more than three years before, though the wrong enabling defendant to receive the money was committed more than three years before.[78]

A surety's right of action for contribution against a cosurety accrues when he pays the debt of his principal, so that limitations do not begin to run against his cause of action until such payment.[79]

As against a claim for services under an implied contract to pay their reasonable value, limitations begin to run at the end of the services, in the absence of agreement as to the time of payment or the length of time the services shall continue.[80]

Where no time was fixed for the term of or payment for personal services continuing until the death of the employer, the ordinary rule is that limitations would not begin to run against a claim until the services ended, in the absence of a general usage to the contrary.[81]

Where a note and mortgage are executed and delivered to the mortgagee, the law implies, in the absence of an agreement to the contrary, that the money loaned thereon is at once due and payable to the mortgagor by the mortgagee, and an action therefor must be brought within three years from such delivery.[82]

[76] Henshaw v. Smith, 171 P. 616, 102 Kan. 599.

[77] Chamberlain v. Wagner, 144 P. 815, 93 Kan. 450.

[78] Perry v. Smith, 2 P. 784, 31 Kan. 423.

[79] Mentzer v. Burlingame, 97 P. 371, 78 Kan. 219, 18 L. R. A. (N. S.) 585.

[80] Blake v. Pratt, 54 P. 806, 8 Kan. App. 486.

[81] In re Jewell's Estate, 103 Kan. 381, 173 P. 923. In action for taking care of property for plaintiff's brother since deceased, a custom of real estate men as to monthly settlements was not controlling as to limitations, in view of character of services and relations of employer and employé. Id.

[82] McBride v. Lombard Mortg. Co., 24 P. 428, 44 Kan. 351.

When the grantee of mortgaged premises assumes and agrees to pay the mortgage debt, as a part of the price, without specifying time for payment, no cause of action accrues against him until the debt becomes due according to the contract of the original parties.[83]

Where a note, payable in two years after date, with interest payable semiannually, was secured by a mortgage, providing that on default in the payment of interest or taxes the whole sum should become due and payable, a cause of action upon default in the payment of interest or taxes did not accrue, so as to start the running of the statute.[84]

No cause of action arises on a contract of an heir to assign his expectancy, until the death of his ancestor.[85]

Where a landowner who had agreed to leave one-half of his farm to his son in consideration of services of the son sold the land, the son's right of action then accrued, and limitations began to run.[86]

Where two persons jointly performed services for several years and were to be paid by the recipient "after she was through with her property," demand against her estate, if timely made, is not affected by the statute of limitations.[87]

Limitations did not begin to run against an action on an agreement to live in the family of another and perform services until the death of himself and his wife in consideration of his property at his death, upon a dismissal of the party who had agreed to perform the services prior to the other party's death, where she did not accept such renunciation as a breach and treat the contract as then at an end.[88]

§ 349. —— Continuing contracts

Where there is single hiring and term of service and time of compensation is not fixed, and service continues until death of employer, limitations do not begin to run against claim for compensation until the services are ended.[89]

[83] Carnahan v. Lloyd, 46 P. 323, 4 Kan. App. 605.
[84] Core v. Smith, 102 P. 114, 23 Okl. 909.
[85] Clendening v. Wyatt, 38 P. 792, 54 Kan. 523, 33 L. R. A. 278.
[86] Engelbrecht v. Herrington, 172 P. 715, 101 Kan. 720, 103 Kan. 21, L. R. A. 1918E, 785.
[87] Dubbs v. Haworth, 171 P. 624, 102 Kan. 603.
[88] Heery v. Reed, 102 P. 846, 80 Kan. 380.
[89] Schaffner v. Schaffner's Estate, 157 P. 402, 98 Kan. 167; Grisham v. Lee, 60 P. 312, 61 Kan. 533; Same v. Greer, 60 P. 312, 61 Kan. 533.

In an action for rent of property, based wholly upon a quasi contract arising by operation of law from the occupation of the premises, without any express or implied contract, no recovery can be had based on such occupancy for more than three years prior to the commencement of the action.[90]

§ 350. —— Severable contracts and installments

Where a note provides that default in interest shall mature the debt at the option of the holder, and there is a default, and the holder does not exercise the option, limitations will not run until the time fixed for payment of the note.[91]

Where a note payable five years after date provides that interest is payable semiannually, and, if not paid punctually, shall become a part of the principal, the installments of interest due more than five years before bringing the suit are not barred by the statute of limitations.[92]

A mortgage by its terms provided that, if any coupon should not be paid when due, the debt secured by mortgage, at the option of the legal holder, might become due and payable without notice. On default in such coupons the mortgagee brought suit for foreclosure, declaring the whole debt due. Thereafter plaintiff died, and the action was dismissed. It was held that the election to declare the debt due was for all purposes, and limitations began to run against the debt from the time of the election, and not from the time the note was due according to its terms.[93]

Where a note became due on default in the payment of interest for two successive semiannual periods, on payment of interest up to December, 1892, limitation would not begin to run until December, 1893, and hence an action commenced in November, 1898, was not barred.[94]

Where a mortgage securing a note due in five years gives the holder an option to declare the note due in advance of maturity, upon default by the maker, limitations do not begin to run until the holder exercises such option.[95]

90 Story v. McCormick, 78 P. 819, 70 Kan. 323.
91 Kennedy v. Gibson, 75 P. 1044, 68 Kan. 612.
92 Beeler v. Highland University Co., 54 P. 295, 8 Kan. App. 89.
93 Westcott v. Whiteside, 64 P. 1032, 63 Kan. 49.
94 Reed v. Culp, 66 P. 616, 63 Kan. 595.
95 York-Ritchie Exch. & Inv. Co. v. Mitchell, 51 P. 57, 6 Kan. App. 317.

§ 351. —— Bonds

An action to recover damages on an attachment bond should be commenced within five years from the final determination of the district court that the order was wrongfully obtained.[96]

Where a petition on a stay bond alleges no element of damage other than the suspension of the right to sue until the determination of the proceeding in error, the cause of action accrued on such determination.[97]

§ 352. —— Covenants—Mortgage deed

The covenants of seisin and of the right to convey, and that the land is free from incumbrances, are broken as soon as the deed is executed, if the title be bad; and a cause of action accrues at once.[98]

One cannot come into court of equity and have a deed declared a mortgage, and then plead the statute of limitations against the mortgage, for in such case the statute begins to run only from date of decree converting deed into mortgage.[99]

§ 353. —— Municipal warrants

Limitations do not run in favor of municipal or quasi municipal corporations upon its outstanding obligations, evidenced by warrants, until the corporation has provided a fund out of which payment of the sum may be made.[1]

This rule does not apply to its ordinary bonded indebtedness represented by negotiable bonds and interest coupons.[2]

[96] Baker v. Skinner, 64 P. 981, 63 Kan. 83.

[97] Cook v. Smith, 72 P. 524, 67 Kan. 53.

[98] Jewett v. Fisher, 58 P. 1023, 9 Kan. App. 630.

[99] Huff v. Lynde-Bowman-Darby Co. (Okl.) 175 P. 250.

[1] Barnes v. Turner, 78 P. 108, 14 Okl. 284, 10 L. R. A. (N. S.) 478, 2 Ann. Cas. 391, judgment affirmed Duke v. Same, 27 S. Ct. 316, 204 U. S. 623, 51 L. Ed. 652, 9 Ann. Cas. 842; Hubbell v. City of South Hutchinson, 68 P. 52, 64 Kan. 645; City of Sulphur v. State, 62 Okl. 312, 162 P. 744.

Where a warrant is issued by the officers of a quasi corporation, and the creditor accepts the same, relying on the ordinary modes of taxation to pay the obligation, the municipality cannot set up the statute of limitations without first showing that it has provided a fund for the payment of such indebtedness. Board of Com'rs of Greer County v. Clarke & Courts, 70 P. 206, 12 Okl. 197.

[2] Schoenhoeft v. Board of Com'rs of Kearny County, 92 P. 1097, 76 Kan. 883, 16 L. R. A. (N. S.) 803, 14 Ann. Cas. 100.

§ 354. —— Torts

A cause of action for tort accrues when the injury is actually done.[3]

[3] The cause of action for permanent injury to a riparian owner from a municipal sewer system constituting a nuisance arises, and the statute of limitations begins to run, when the municipality begins to operate the system and occasions the injury. City of Mangum v. Sun Set Field (Okl.) 174 P. 501.

Action for damages caused by subsidence of surface of land due to mining coal therefrom is not barred by limitations until two years have elapsed after the subsidence. Walsh v. Kansas Fuel Co., 102 Kan. 29, 169 P. 219; Audo v. Western Coal & Mining Co., 162 P. 344, 99 Kan. 454.

Cause of action for damages to land from a natural enlargement of a ditch rightfully dug by defendant on its right of way accrued when ditch invaded plaintiff's land and damages for permanent injury were recoverable, and was barred when not commenced within two years. Civ. Code Kan. § 17, subd. 3 (Gen. St. Kan. 1909, § 5610); Pever v. Atchison, T. & S. F. Ry. Co., 164 P. 159, 100 Kan. 266.

An owner's right of action for permanent damages from the pollution of a stream by operation of a sewer system and oil refinery held barred by limitations, where action was not brought within two years after the sewer system and refinery were in operation. McDaniel v. City of Cherryvale, 136 P. 899, 91 Kan. 40, 50 L. R. A. (N. S.) 388.

An adjacent owner's action against a city for damages from overflow caused by street improvements is barred by Code Civ. Proc. § 17, subd. 3 (Gen. St. 1909, § 5610), unless brought within two years. Beard v. Kansas City, 150 P. 540, 96 Kan. 102.

An action for damages from an overflow caused by defective construction of railroad embankments is not barred by limitations until more than two years have passed since the injury, though the embankments were constructed more than two years before. Atchison, T. & S. F. Ry. Co. v. Eldridge, 139 P. 254, 41 Okl. 463.

An action for personal injuries, being an action not arising on a contract, must under Comp. Laws 1909, § 5550, subd. 3, be brought within two years after cause of action accrues. Waugh v. Guthrie Gas Light, Fuel & Improvement Co., 131 P. 174, 37 Okl. 239, L. R. A. 1917B, 1253.

When the cause of injury to realty is not permanent, the statute of limitations does not begin to run until the injury is suffered. St. Louis & S. F. R. Co. v. Ramsey, 132 P. 478, 37 Okl. 448.

The right of action against a city for injury from the flooding of property by the negligent construction of a sewer accrues when the property is flooded, and limitation runs only from that date. Kansas City v. King, 68 P. 1093, 65 Kan. 64.

Where a railway held goods in its warehouse for a consignee, and was induced by wrongful acts of the consignor to deliver them to one not the owner, limitations began to run on the cause of action against the consignor at the time his tortious act was committed, and not from the time when the company was compelled to pay to the consignee the value of the goods. Nashville, C. & St. L. Ry. v. Dale, 74 P. 596, 68 Kan. 108.

Where a corporation enters on the building of another, and without his

Where a city so grades and paves a street as to collect the surface water for a large area and discharge it on the property of plaintiff, through a failure to provide suitable outlets for said water, the city has a legal right, and it is its legal duty, to terminate the cause of injury, and the damage thereby caused is a continuing damage, and the statute of limitations does not begin to run so long as the damage so continues.[4]

Limitations commence to run against an action against a city for damages for flooding of land owing to the negligence of the city in the paving and guttering of a street at the time of the flooding, and not at the time of the improvement causing the same.[5]

A right of action against an abstractor for damages from imperfections or error in an abstract accrues when the examination is reported, and not when the error is discovered, and the damages resulting therefrom have been paid.[6]

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), the statute of limitations began to run from date of death, and not from date of accident.[7]

§ 355. —— Guaranty

A guarantor who has become such at the request of the principal has the benefit of an implied promise of indemnity, and a new and independent cause of action arises thereon whenever he is compelled to make a payment, irrespective of the time of maturity of original debt.[8]

consent fastens a telegraph wire to the roof, which does no injury to the property at the time, but thereafter, on account of additional wires being connected with the wire so fastened the building is greatly damaged, the right of action for such damage arises from the placing of the additional wires, and the statute of limitations begins to run only from that time. Western Union Tel. Co. v. Moyle, 32 P. 895, 51 Kan. 203.

[4] City of Kansas City v. Frohwerk, 62 P. 432, 10 Kan. App. 120.

[5] City of Kansas City v. Frohwerk, 62 P. 252, 10 Kan. App. 116.

[6] Walker v. Bowman, 111 P. 319, 27 Okl. 172, 30 L. R. A. (N. S.) 642, Ann. Cas. 1912B, 839, reversing judgment 105 P. 649, on rehearing; Provident Loan Trust Co. v. Wolcott, 47 P. 8, 5 Kan. App. 473.

[7] Lindsay v. Chicago, R. I. & P. Ry. Co., 56 Okl. 234, 155 P. 1173.

[8] Leslie v. Compton, 172 P. 1015, 103 Kan. 92, L. R. A. 1918F, 706.

§ 356. —— Malfeasance in office

A cause of action against a court clerk for moneys of litigants received in his official capacity accrues and limitation begins to run upon his conversion of such moneys.[9]

§ 357. —— Statutory liability

That a cause of action is created by statute and did not exist at common law does not necessarily prevent the limitation as to time within which same may be brought from being subject to tolling provisions of statute.[10]

Where a lien on the rents and profits of land was created by operation of law to pay the value of improvements, the statute of limitations would not run so long as the rents and profits were being applied to the extinguishment of the lien.[11]

§ 358. Equitable actions

Limitations against a creditor's bill begin to run from return of an execution on judgment nulla bona.[12]

Limitations will not commence to run against a cause of action on an executory contract to enforce specific performance, while the grantor is receiving from the grantee payments on the contract as part performance thereof.[13]

Where one sells land to others executing a bond for a deed, and they on their part execute, as a part of the purchase price, their promissory notes, and the owner conveys the land to plaintiffs by a warranty deed, in pursuance of a prior contract of sale, plaintiffs' right to be subrogated to the rights of the vendor on the notes of defendants accrues on the execution of their deed.[14]

§ 359. Conditions precedent

The statute of limitations on a cause of action in the nature of a creditors' bill begins to run from the time an execution on the judgment is returned nulla bona, and not from the date of the fraudulent transfer of the property, sought to be subjected to the judgment.[15]

[9] Purcell Bank & Trust Co. v. Byars (Okl.) 167 P. 216.
[10] Bean v. Rumrill (Okl.) 172 P. 453.
[11] Silversmith v. Hart (Okl.) 173 P. 451.
[12] Indian Land & Trust Co. v. Owen, 63 Okl. 127, 162 P. 818.
[13] Burnell v. Bradbury, 74 P. 279, 67 Kan. 762.
[14] Brown v. Pilcher, 58 P. 560, 60 Kan. 860.
[15] Blackwell v. Hatch, 73 P. 933, 13 Okl. 169.

Running of limitations in an action to subject property fraudulently conveyed cannot be indefinitely postponed by the delay of the creditor in reducing his claim to judgment.[16]

Where a deed described a certain mortgage, "which grantee assumes and agrees to pay," limitations begin to run from acceptance of the deed by the grantee.[17]

Although during pendency of suit defendant conveys realty, of which plaintiff had knowledge limitations do not begin to run against plaintiff's right to subject the land to payment of his claim until judgment has been rendered in the original action, if prosecuted with reasonable diligence.[18]

Where a deed is executed and delivered as an escrow, to take effect on the grantor's death, the consideration therefor is not due until then, and the cause of action for the consideration does not accrue, nor does the statute of limitations begin to run, until an administrator is appointed.[19]

An action in the nature of a creditors' bill to set aside a fraudulent conveyance of land, and to subject the same to the payment of a judgment, must be brought within two years after the plaintiff is in position, by reason of his judgment, to maintain the suit.[20]

§ 360. Trust

Limitations ordinarily do not commence to run against a trustee until he repudiates the trust or denies his liability, and it should appear that the beneficiary had, or ought to have had, knowledge of such repudiation or denial.[21]

[16] Donaldson v. Jacobitz, 72 P. 846, 67 Kan. 244.

[17] Hendricks v. Brooks, 101 P. 622, 80 Kan. 1, 133 Am. St. Rep. 186.

[18] Young v. Buck, 154 P. 1010, 97 Kan. 195, denying rehearing 154 P. 213, 97 Kan. 39.

[19] Mills v. Mills, 23 P. 944, 43 Kan. 699.

[20] Taylor v. Lander, 60 P. 320, 61 Kan. 588, judgment Lander v. Pollard, 46 P. 975, 5 Kan. App. 621, affirmed.

[21] Cooley v. Gilliam, 102 P. 1091, 80 Kan. 278.

The statute does not commence to run in favor of a trustee of land, as against the beneficiary, until a renunciation of the trust. Kansas City Inv. Co. v. Fulton, 46 P. 188, 4 Kan. App. 115.

A suit to impress money as a trust, filed as an amended petition in 1911 to an action begun in 1907 for money paid by mistake, held barred by limitations, where the trust had been disavowed in 1903 with notice to all parties interested. Nicholson v. Nicholson, 146 P. 340, 94 Kan. 153. The act of a party in obtaining money in 1898, and refusing to return it in 1903, with full

Where a trust results by implication of law, a recognition by the trustee of the rights of the equitable owner tolls the running of limitations until the holder of the title disavows the trust.[22]

Limitations against an action by a Grand Lodge against a bank for the amount of an overdraft by the defaulting treasurer of the lodge do not begin to run in favor of the bank until the beneficiary discovered the breach of trust.[23]

ARTICLE IV

LIMITATION PERIODS

Sections

361. Application of statutes.
362. Real actions.
363. Other actions.
364. Fraud.
365. Foreign judgment—Bonds, etc.
366. Action for recovery of estate sold by guardian.
367. Liens.
368. Liens against railroads.
369. Actions against notaries.
370. Rejected claim.
371. Vacancy in administration.
372. Action against sureties on bond.
373. Actions for wrongful death.
374. Assessments—Suits to set aside.
375. Demand—Tender.
376. Actions for usurious interest.
377. Tax deed.
378. Nonresident alien landowners.

§ 361. Application of statutes

Civil actions can only be commenced within the periods prescribed in this article, after the cause of action shall have accrued; but where, in special cases, a different limitation is prescribed by statute, the action shall be governed by such limitation." [24]

§ 362. Real actions

"Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought

knowledge of all parties from the latter date, held such a denial of a claim that the money was a trust fund that suit should have been brought within the limitation period. Id.

[22] Hunnicutt v. Oren, 114 P. 1059, 84 Kan. 460.

[23] Washbon v. Linscott State Bank, 125 P. 17, 87 Kan. 698.

[24] Rev. Laws 1910, § 4654.

within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter:[25]

"First. An action for the recovery of real property sold on execution, brought by the execution debtor, his heirs, or any person claiming under him, by title acquired after the date of the judgment, within five years after the date of the recording of the deed made in pursuance of the sale.[26]

"Second. An action for the recovery of real property sold by executors, administrators or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased person, or the ward or his guardian, or any person claiming under any or either of them, by the title acquired after the date of the judgment or order, within five years after the date of the recording of the deed made in pursuance of the sale.[27]

"Third. An action for the recovery of real property sold for taxes, within two years after the date of the recording of the tax deed.[28]

[25] The statute of limitations contained in St. 1893, § 5668, relating to actions to recover possession of realty, does not apply to an action to quiet title. Lowenstein v. Sexton, 90 P. 410, 18 Okl. 322.

[26] The five-year statute of limitations (Code Civ. Proc. § 15 [Gen. St. 1909, § 5608]), against actions for recovery of real property sold on execution brought by the execution debtor or any person claiming under him by title acquired after the judgment, applies to all sales, void and voidable. James v. Logan, 108 P. 81, 82 Kan. 285, 136 Am. St. Rep. 105.

[27] The purchaser of land at guardian's sale under order of probate court, after five years from record of deed, is not barred by Rev. Laws 1910, § 4655, subd. 2, from bringing suit against one in possession for more than one year and claiming under a title having no relation to the guardianship proceedings. Drennan v. Harris (Okl.) 161 P. 781.

The five-year statute of limitations (Civ. Code Kan. § 15, subd. 2 [Gen. St. Kan. 1909, § 5608]) held not to apply to an action to recover realty by one claiming title from a source paramount to an administrator's deed. Byerly v. Eadie, 148 P. 757, 95 Kan. 400, judgment modified 150 P. 523, 96 Kan. 137. An heir or devisee having title paramount to, and independent of, that claimed by decedent, may sue to quiet title or to recover possession irrespective of the five-year statute (Civ. Code Kan. § 15, subd. 2 [Gen. St. Kan. 1909, § 5608]). Id.

The five-year limitation prescribed by Gen. St. Kan. 1909, § 5608 (Code Civ. Proc. Kan. § 15), subd. 2, does not apply to an action to recover land sold by one as guardian, who was not so appointed. Harrison v. Miller, 123 P. 854, 87 Kan. 48.

[28] Where the holder of a valid tax deed, before the two-year limitation has barred his right to recover possession under it, obtains the actual and peaceable possession of the land, the statute is satisfied, and, if he thereafter loses

"Fourth. An action for the recovery of real property not hereinbefore provided for, within fifteen years.[29]

"Fifth. An action for the forcible entry and detention, or forcible detention only, of real property, within two years." [30]

§ 363. Other actions

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

"First. Within five years: An action upon any contract, agreement or promise in writing.[31]

possession, his right to recover it continues until barred by the general statute of limitations. Buckner v. Wingard, 115 P. 636, 84 Kan. 682.

Plaintiff assigned a land certificate in blank and forwarded it to defendant in 1896, with authority to insert the name of a purchaser, but defendant inserted his own name as assignee, and had the assignment recorded in 1900 without paying any consideration therefor, and in 1899 paid certain deferred payments then due, preventing forfeiture, and obtained a patent in 1905. Plaintiff learned on February 9, 1900, that defendant held the land in his own name as his own, and brought an action in 1905 to recover the land on the ground of fraud in inducing him to assign the certificate in blank, whereby defendant was enabled to insert his own name as purchaser. Held that, if plaintiff had any cause of action to recover the land, it was barred by the two-year statute of limitations. Martin v. Cochran, 106 P. 45, 81 Kan. 602.

[29] Action to cancel void conveyance is not barred by any lapse of time short of that sufficient to establish title by prescription, as fixed by Laws 1910, § 4655, subd. 4. Burckhalter v. Vann, 59 Okl. 114, 157 P. 1148.

Where primary purpose of action was to recover possession of land, though cancellation of deed was asked, the 15-year statute of limitations found in Rev. Laws 1910, § 4655, subd. 4, applies. Campbell v. Dick (Okl.) 176 P. 520.

Where primary purpose of an action is recovery of real property, and incidental relief is sought, Rev. Laws 1910, § 4655, subd. 4, limiting time of bringing suit to 15 years, and section 4657, subd. 3, does not apply, notwithstanding the incidental relief sought is that deed obtained by fraud be declared a mortgage. Franklin v. Ward (Okl.) 174 P. 244.

In an action to quiet title, defendant, by cross petition and answer, alleged that he was joint owner with plaintiff of the land, that plaintiff was in possession, and held the legal title in trust for him, and asked for a recovery, to have all adverse interest determined, and also for an accounting for taxes and improvements. Held, that defendant's main cause of action was for the recovery of real property, and the statutory limitation of 15 years was applicable. Reihl v. Likowski, 6 P. 886, 33 Kan. 515.

[30] Rev. Laws 1910, § 4655.

[31] An action to recover damages on an attachment bond is an action on a written contract, and is not barred until the expiration of five years from the time the right of action accrues. Baker v. Skinner, 64 P. 981, 63 Kan. 83.

An instrument acknowledging receipt of a sum of money, and stating that the party receiving it deducted the same from the purchase price of described

"Second. Within three years: An action upon a contract express or implied, not in writing; an action upon a liability created by statute, other than a forfeiture or penalty.[32]

land as commission for the sale, as the commission belonged to a third person and by agreement was to be deducted from the price is not an agreement, contract, or promise in writing upon which an action may be brought within five years, but is a mere receipt for the money. Lewis v. Norris, 103 P. 134, 80 Kan. 620. An instrument acknowledging receipt of a sum of money as belonging to a person named, but containing no statement of any fact from which the law implies an obligation or promise, is not an agreement, contract, or promise in writing upon which an action may be brought within five years. Id.

Where one contracts in writing to drill gas wells to be paid for whenever a paying well has been drilled, and the other party refuses to make payment and the work is abandoned, an action for the work already done is an action upon the contract governed by five-year limitations. Bailey v. Fredonia Gas Co., 109 P. 411, 82 Kan. 746.

A township warrant is such a promise in writing that an action may be brought thereon against such township at any time within five years from the date of its issue. Walnut Township v. Jordan, 16 P. 812, 38 Kan. 562.

In an action on a note and mortgage securing the same, the limitations prescribed by Gen. St. Kan. 1901, § 4446, apply, and not those of section 4444, relating to actions for the recovery of real property, and not for the recovery of money. Kirk v. Andrew, 97 P. 797, 78 Kan. 612.

In an action on a note, wherein the defense was limitations, it was error to instruct that, unless a partial payment indorsed on the note was made on the date indorsed, plaintiff could not recover, and to refuse an instruction that the action would not be barred if payment was made at or near such date, and within the statutory period of limitation, though plaintiff testified that the payment was made on the date stated. Keener v. Lloyd, 133 P. 710, 90 Kan. 250.

An action by a partner to enforce a constructive trust arising in his favor by acts of his copartner is barred in five years unless cause for the delay is shown. Hackett v. Pratt, 49 P. 100, 5 Kan. App. 586.

[32] An action on a judgment held not an action on a contract, and therefore barred within three years under Rev. Laws 1910, § 4657, subsec. 2. Wakeman v. Peter, 52 Okl. 639, 152 P. 455.

Action to recover share of partnership losses, where alleged partnership agreement was oral, and where existence of partnership was denied, was an action to establish partnership agreement, based upon a "contract not in writing," and within the three-year limitation. Patterson v. Bonner (Okl.) 175 P. 826.

An action to recover public money unlawfully received by a public officer is barred in three years. Shelton v. State, 62 Okl. 105, 162 P. 224.

A suit by the guardian of a minor against a former guardian and sureties to recover the amount due to the ward was not barred when it was begun within three years from the date of former guardian's settlement in county court and during ward's minority. Driskill v. Quinn (Okl.) 170 P. 495.

Kansas cases.—A cause of action against a guardian for a balance due

when the ward reached the age of majority accrues at that time, and is a liability created by statute, to which the three-year limitation applies, under Code Civ. Proc. 1909, § 17, subd. 2 (Gen. St. 1909, § 5610), though the action is on the guardian's bond. Hawk v. Sayler, 83 Kan. 775, 112 P. 602.

A judgment was rendered against a corporation June 30, 1906. Execution issued February 15, 1907, and was returned unsatisfied for want of property on which to levy. Held, that the judgment creditor had three years thereafter in which to begin an action to enforce the judgment against a stockholder. Douglass v. Loftus, 119 P. 74, 85 Kan. 720, L. R. A. 1915B, 797, Ann. Cas. 1913A, 378.

The liability of an officer to pay over money to the county treasurer, as required by law, is one created by statute; and an action thereon against the sureties on the bond can only be brought within three years after the cause of action has accrued. Board of Com'rs of Cloud County v. Hostetler, 51 P. 62, 6 Kan. App. 286.

A civil action, brought under Gen. St. 1897, c. 18, § 74, against bank officers, for the recovery of deposits received by them when the bank was in a failing condition, is on a "liability created by statute," within Civ. Code, § 12, subd. 2, requiring such action to be brought within three years. Seglem v. Yaeger, 56 P. 508, 8 Kan. App. 655.

Under Code Civ. Proc. § 17 (Gen. St. 1915, § 6907), an action on a liability imposed by statute, including the statutes of Arkansas, is barred in three years after such statutory liability has accrued. Davis v. Drury, 105 Kan. 69, 181 P. 559.

A civil action by the state to enforce a lien for fines and costs against the owner of real estate who has knowingly suffered a person to sell liquor thereon in violation of law is an action "on a liability created by statute," within the meaning of Code, § 18, subd. 2, which provides that an action on a liability created by statute is barred in three years, and is not an action on a "statute for a penalty or forfeiture," within the meaning of subdivision 4, barring such actions in one year. State v. Pfefferle, 7 P. 597, 33 Kan. 718.

An action under Acts 1881, § 15, for damages by sale of intoxicating liquors, is purely statutory, and must be commenced within three years after the cause of action shall have accrued as prescribed by subdivision 2 of section 18 of the Code; the action being on a liability created by statute other than a forfeiture or penalty. Durein v. Pontious, 8 P. 428, 34 Kan. 353.

The three-year statute of limitation (Code Civ. Proc. § 18, subd. 2), applicable to actions on liabilities created by statute, has no application to an original action in the supreme court, instituted by the attorney general in the name of the state, to compel the officers of a county to keep their offices at the county seat, and to determine its location; it being but an exercise of the sovereign power of the state compelling obedience to its statutory mandates. (1887) State v. Stock, 16 P. 106, 38 Kan. 154, rehearing denied (1888) 16 P. 799, 38 Kan. 184.

An action on the official bond of a county clerk to recover fees wrongfully retained is an action on a liability created by statute, and barred by the three-year statute of limitations (Civ. Code, § 18, subd. 2), and is not governed by section 18, subd. 5, providing that an action on an official bond can be brought only within five years after the cause of action accrues. Board of Com'rs of Graham County v. Van Slyck, 35 P. 299, 52 Kan. 622.

The liability of an administrator for failure to pay over money of the es-

tate to his successor when ordered to do so by the probate court is one created by statute, and an action thereon by the administrator de bonis non against the sureties upon the bond of the former administrator can only be brought within three years after the cause of action has accrued. Davis v. Clark, 49 P. 665, 58 Kan. 454.

A civil action brought under Gen. St. 1897, c. 18, § 74, against bank officers for the recovery of deposits received by them when the bank was in a failing condition, is upon a "liability created by statute," and is therefore governed by Civ. Code, § 12, subd. 2, prescribing three years as the limit for bringing an action on such liability. Judgment Ashley v. Frame (1896) 45 P. 927, 4 Kan. App. 265, reversed. Frame v. Ashley, 53 P. 474, 59 Kan. 477.

The three-year statute of limitations of Code Civ. Proc. div. 3, § 18 (Gen. St. 1901, § 4446), does not bar the issuance and enforcement of an execution under an order of court therefor, made pursuant to the statute relative to the double liability of stockholders in a corporation, as the issuance and enforcement of such an execution is not the bringing of a "civil action," within such section, and the execution is based on the order awarding it, and not on the statutory liability of the stockholder. Wheeler v. Chenault, 66 P. 1010, 63 Kan. 730.

The obligation resting on a township, which is a legal successor of a county covering the same territory, and which has received the assets of such county, is not a statutory one, nor an implied obligation, as those terms are used in the statute of limitations, but is an obligation identical with that which rested upon the original county. Van Auken v. Garfield Tp., Finney County, 72 P. 211, 66 Kan. 594.

The statute requiring actions to enforce a liability created by statute to be brought within three years does not apply to suits brought to enforce tax liens. Whitney v. Board of Com'rs of Morton County, 85 P. 530, 73 Kan. 502.

Where mother conveyed land to sons on oral agreement to care for her during her life, action by her daughter 22 years after mother's death to cancel deed for nonperformance by grantees is barred by limitations. Wilson v. Highley, 157 P. 411, 98 Kan. 154.

Where the joint maker of a note pays the same, and afterwards sues the other joint maker to recover the amount paid, on the ground that plaintiff was only a surety, and there is no written agreement between the parties that plaintiff should be liable only as surety, his action is on a contract not in writing, and must be brought within three years after he pays the note, under Comp. Laws, § 3811. Guild v. McDaniels, 23 P. 607, 43 Kan. 548.

An action to recover rents for land wrongfully withheld is founded on an implied contract to which the three-year statute of limitations applies. Harlan v. Loomis, 140 P. 845, 92 Kan. 398.

A cause of action for rents and profits, although joined with one in the nature of ejectment, is founded on an implied contract, and therefore the three-year limitation provided in Civ. Code, § 18, subd. 2, applies. Seibert v. Baxter, 12 P. 934, 36 Kan. 189.

A claim against the assignee of an insolvent firm for a trust fund, which came into his hands with the assigned estate, is barred by the three-years statute of limitations, though the contract with reference thereto between the claimant and the assignor was in writing. The assignee's liability to account as trustee for the claimant is founded not on the contract, but on his

"Third. Within two years: An action for trespass upon real property; an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." [33]

receipt of funds which in equity belong to the claimant. Burrows v. Johntz, 48 P. 27, 57 Kan. 778.

Where a candidate for a state office was charged with misconduct as county clerk and requested, in writing, the county board to inform him whether he was indebted to the county, and agreed to be bound by their decision, and on their report that he owed a certain sum, paid it, and subsequently brought suit to recover, claiming that the payment was under duress, his right of action, if any, was on the county's implied contract to restore the money, and not under a written contract; and hence the statute of limitations applicable was the three-year statute, and not that of five years. Kelly v. Board of Com'rs of Miami County, 116 P. 477, 85 Kan. 38.

An action against an abstracter of titles for damages for giving a wrong certificate of title is not one on the bond which he has given pursuant to statute, nor on an agreement in writing (Code Civ. Proc. § 18, subd. 1), but on a contract not in writing (subdivision 2), and is hence barred in three years. Provident Loan Trust Co. v. Wolcott, 47 P. 8, 5 Kan. App. 473.

Action for services and materials, begun three years and two months after they were furnished, is barred by limitation. Wichita Water Co. v. City of Wichita, 158 P. 49, 98 Kan. 256.

A passbook given by a bank to a depositor is not a written contract, but is a mere receipt for the amount deposited; and an action thereon is barred by the three-year limitation. Civ. Code, § 18. Talcott v. First Nat. Bank, 36 P. 1066, 53 Kan. 480, 24 L. R. A. 737.

An action for the recovery of damages for a failure to comply with the terms of a written agreement to erect a house, and to furnish all labor and material therefor, is an action upon an agreement, contract, or promise in writing, and is not barred by the three-years statute of limitations. Lingren v. Fletcher, 56 P. 328, 8 Kan. App. 376.

Where plaintiff and defendant agreed in writing to erect a building, each to pay one-half the cost, an action by plaintiff for a sum paid by him in excess of his half was not barred in three years. Ross v. Wellington Lodge No. 133, I. O. O. F., 146 P. 1003, 94 Kan. 528.

[33] Rev. Laws 1910, § 4657.

Actions for specific recovery of personal property must be brought within two years. Torrey v. Campbell (Okl.) 175 P. 524.

Action for wrongfully killing cattle must be brought within two years. Missouri, K. & T. Ry. Co. v. Wilcox, 121 P. 656, 32 Okl. 51.

Limitation of two years, not fifteen-year limitation, applies to action in ejectment in form, but in substance for relief for fraud. Campbell v. Dick (Okl.) 157 P. 1062.

In replevin, where plaintiff contended that he had acquired title to proper-

ty by possession for two years, held that, under evidence, two-year statute of limitations was not applicable. McLaughlin v. Dugan (Okl.) 166 P. 1069.

Kansas cases.—Under Civ. Code, § 18, declaring that actions for taking, detaining, or injuring personal property must be brought within two years, and actions on the official bonds of sheriffs, etc., within five years, an action on a sheriff's bond for the wrongful levy on and sale of personal property must be brought within two years. Ryus v. Gruble, 3 P. 518, 31 Kan. 767.

Under Civ. Code, § 18, subd. 3, an action against a city for injuries by a change of the channel of a stream by a permanent improvement must be brought within two years after such change. Parker v. City of Atchison, 48 P. 631, 58 Kan. 29.

Under Civ. Code, § 18, declaring that actions for taking, detaining, or injuring personal property must be brought within two years, and actions on the official bonds of sheriffs, etc., within five years, an action on a sheriff's bond for the wrongful levy on and sale of personal property must be brought within two years. Ryus v. Gruble, 3 P. 518, 31 Kan. 767.

Comp. Laws 1885, c. 66, § 14, which provides that actions for damages by the erection of a milldam must be brought within two years after the erection of the dam, applies only to permanent obstructions, and does not apply to actions for the recovery of damages, where the upper proprietor, who has actually built, and has in operation, a mill and milldam, seeks to have the dam of defendant abated or lowered as an obstruction, and has commenced, within two years after the completion of the dam, an action to abate or lower it. Hardesty v. Ball, 23 P. 937, 43 Kan. 151, modifying judgment 22 P. 1095.

A cause of action founded upon an allegation that the register of deeds "wrongfully, willfully, and negligently" recorded an instrument, and failed to insert in the record the correct description of the land conveyed, by reason of which the plaintiff was damaged, is "an action for injury to the rights of another, not arising on contract," and such action can only be commenced within two years after the cause of action accrues. Hatfield v. Malin, 50 P. 108, 6 Kan. App. 855.

An employé's action for injuries from the master's failure to comply with the Factory Act (Laws 1903, c. 356, Gen. St. 1909, §§ 4676, 4683) is not barred by Code Civ. Proc. § 17, subd. 4 (Gen. St. 1909, § 5610), providing that an action upon a statute for a penalty or forfeiture shall be barred within one year, but is an action for injury to the rights of another not arising on contract, which carries a two years' limitation. Slater v. Atchison, T. & S. F. Ry. Co., 137 P. 943, 91 Kan. 226, L. R. A. 1916F, 949.

The tort statute of limitations has no application to an action on quasi contract to recover money paid by mistake. Kansas City v. R. J. & W. M. Boyd Const. Co., 120 P. 347, 86 Kan. 213.

Code Civ. Proc. § 18, subd. 3, declares that actions on liabilities created by statute shall be brought within three years. Section 18, subd. 2, declares that "an action for an injury to the rights of another, not arising on contract," shall be brought within two years. Held, that the limitation of two years applies to an action brought by a servant against his master to recover for injuries caused by the negligence of the master, or from the negligence of a fellow servant. Atchison, T. & S. F. R. Co. v. King, 3 P. 565, 31 Kan. 708.

An action for trespass through the permanent obstruction of the channel of a stream so as to divert its natural flow against the opposite bank, and

§ 364. —— Fraud

A cause of action for relief on the ground of fraud is barred by the two-year statute of limitations, if the fraud is discovered more than two years before the action is commenced.[34]

thereby destroy a portion of plaintiff's land, held barred by the two-year statute of limitations. Taylor v. Newman, 139 P. 369, 91 Kan. 864.

Where the complaint alleges the conversion of personalty in 1902, the action therefor in 1910 is barred, though there is a prayer for an accounting. Blackwell v. Blackwell, 129 P. 173, 88 Kan. 495.

Where property had been seised on execution, interplea, alleging ownership and claiming the return thereof, comes too late after two years. Gardner v. Quick, 54 P. 1034, 8 Kan. App. 559.

[34] Losch v. Pickett, 12 P. 822, 36 Kan. 216; Sherman v. Havens, 119 P. 370, 86 Kan. 99.

A suit for fraud in exchange of property not commenced within two years after cause of action accrued was barred by the statute of limitations. Cornelssen v. Harman, 103 Kan. 624, 176 P. 141.

An action for relief on the ground of fraud, not brought for eight years after discovery thereof, was barred by the two-year statute of limitations. Fix v. Rose, 64 Okl. 113, 166 P. 145.

An action by a trustee in bankruptcy against bankrupt and insurance companies for fraudulent conspiracy in compromising and paying insurance proceeds pending bankruptcy is barred after two years. Tripp v. English, 59 Okl. 225, 158 P. 912. A petition in tort action, showing on its face it was filed more than two years after date of the tort, is demurrable. Id.

Where on exchange of property the deed to plaintiff expressly provided for assumption of mortgage, in suit to set aside mortgage as being placed on property to defraud plaintiff, he will be deemed to have notice of fraud within two-year statute of limitations when he accepted deed; there being no showing of illiteracy. Ostran v. Bond (Okl.) 172 P. 447.

Kansas cases.—Any action by one defrauded of money, in which a recovery depends on proof of the fraud, unless begun within two years after its discovery, is barred by Gen. St. 1915, § 6907, subd. 3, though, under subdivision 2, limitation for action on oral contract, express or implied, is three years. Orozem v. McNeill, 103 Kan. 429, 175 P. 633, 3 A. L. R. 1598.

Civ. Code, § 18, subd. 3, providing that a cause of action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the fraud, does not apply to an action founded on contract. Judgment (1903) 70 P. 933, modified. Atchison, T. & S. F. Ry. Co. v. Atchison Grain Co., 75 P. 1051, 68 Kan. 585, 1 Ann. Cas. 639. An action to recover for violation of a verbal agreement in which there was a stipulation against discrimination accrues within 3 years from the violation of the agreement, and an averment that defendant concealed such discrimination until less than 18 months before the filing of the petition shows no ground for postponing the operation of limitations. Judgment (1903) 70 P. 933, modified on rehearing. Id.

—— *Actions to which statute is applicable.*—Where a county clerk fraudulently draws county warrants for a sum in excess of the amount allowed by the board of county commissioners, the cause of action against him and his

bondsmen does not accrue until discovery of the fraud. Allen v. State, 51 P. 572, 6 Kan. App. 915.

Where an officer misappropriates money intrusted to him and fraudulently conceals his default, limitations will not begin to run until the discovery of the fraud and of the breach of the conditions of his bond. McMullen v. Winfield Building & Loan Ass'n, 67 P. 892, 64 Kan. 298, 56 L. R. A. 924, 91 Am. St. Rep. 236.

When property is fraudulently sold, by the administrator of a partnership, to pay debts of the partnership, for which purpose he has in his hands other partnership assets, which he conceals and applies to his own use, such administrator is chargeable, with the rents and profits of such property from the date of sale; such recovery not being barred by the three-years statute of limitations, concerning implied contracts, since the cause of action dates from the discovery of the fraud. Branner v. Nichols, 59 P. 633, 61 Kan. 356.

An action to establish a partnership and plaintiff's interest therein, and for an accounting, held not an action for relief on the ground of fraud, and hence not governed by the statute of limitations relating to actions for fraud. Holmes v. Culver, 133 P. 164, 89 Kan. 698.

An attorney employed to collect a claim without authority from his client employed another attorney to assist him; and they jointly collected part of it, and failed to account. The attorney originally employed notified the client that he had made the collection, and promised to pay over the money, and afterwards informed her of his employment of the other attorney to assist him. Held, that an action to recover the money collected, brought against the attorney not employed by plaintiff, four years after her attorney told her of his employment, was barred by limitations. Eaton v. Elliott, 57 P. 243, 9 Kan. App. 882.

When a city's overpayments to a contractor by reason of fraudulent measurements were made, a cause of action against the contractor and the surety on his bond to recover them back accrued, and an action against the surety was barred in five years therefrom, irrespective of when the fraud was discovered. City of Topeka v. Ritchie, 102 Kan. 384, 170 P. 1003.

An action for damages from inducing plaintiff to become a user of morphine in ignorance of its nature held not an action for relief "on the ground of fraud" within the statute of limitations. Gillmore v. Gillmore, 137 P. 958, 91 Kan. 293, 295, 51 L. R. A. (N. S.) 838, judgment modified on rehearing 139 P. 386, 91 Kan. 707, 51 L. R. A. (N. S.) 834.

In an action by a wife against her husband and his brother to cancel and set aside a tax deed, plaintiff alleged that her husband, for valuable consideration, agreed to pay all taxes levied against her land; that he failed to pay the taxes and permitted the land to be sold at tax sale; that he caused certificates of sale and tax deeds to be issued and executed to such brother, who was a party to the wrong. Held, that the action was for relief upon the ground of fraud. Doyle v. Doyle, 7 P. 615, 33 Kan. 721.

In an action recovery against a garnishee depended upon whether certain conveyances made to him were fraudulent, and this issue was developed by the evidence on the trial, and was the theory on which the garnishment proceedings were conducted. Held, that such proceedings were "an action for relief on the ground of fraud." Nelson v. Stull, 68 P. 617, 65 Kan. 585, judgment affirmed 70 P. 590, 65 Kan. 585.

In an action by a wife against her husband and his brother to cancel and

set aside a tax deed, plaintiff alleged that her husband, for valuable consideration, agreed to pay all taxes levied against her land, that he failed to pay the taxes and permitted the land to be sold at tax sale, and that he caused certificates of sale and tax deeds to be issued and executed to such brother, who was a party to the wrong. Held, that the action for relief on the ground of fraud. Doyle v. Doyle, 7 P. 615, 33 Kan. 721.

An action brought by the buyer of corporate stock to open up an account stated as to the amount of outstanding corporate liability assumed by him and to remake the account according to the agreement held not an action for relief on the ground of fraud, though he alleged that the account was not only incorrect, but was fraudulently made so by the seller. McCue v. Hope, 154 P. 216, 97 Kan. 85, 11 A. L. R. 581.

An action to charge defendant for the amount of a debt owing plaintiff from one who gave defendant a chattel mortgage to secure debt, on property of more value than his debt, is an action for fraud, and barred by limitations of two years. Houghton v. Axelsson, 67 P. 825, 64 Kan. 274.

Misconduct of an arbitrator in acting from motives of bias or partiality, or from a misconception of duty in making the award, arising from the belief that he was the representative of one of the parties thereto, does not constitute fraud, so as to cause a right of action or defense based on the illegality of the award to be barred by the two-year statute of limitations. Downey v. Atchison, T. & S. F. R. Co., 57 P. 101, 60 Kan. 499.

An action to impose a trust on the entire assets of one who has wrongfully converted public funds must be brought within two years, under Civ. Code, § 18, subd. 3, providing that an action for relief on the ground of fraud must be commenced within that time. City of Clay Center v. Myers, 35 P. 25, 52 Kan. 363.

—— *Deeds.*—An action to set aside a deed for fraud is ordinarily barred in two years after the filing of such deed for record in the office of the register of deeds of the county where the land is situated. Rogers v. Richards, 74 P. 255, 67 Kan. 706.

Where defendant induced plaintiff to sign a deed of land to him, she supposing it to be a power of attorney, an action for relief is not barred until two years after the discovery of the deception. Kahn v. Klaus, 67 P. 542, 64 Kan. 24.

In an action to set aside a deed on the ground of fraud, the cause of action will not be deemed to have accrued at the time of the delivery of the deed, but at the time of the discovery of the fraud by means of which the grantor was induced to execute and deliver the same. Brown v. Brown, 64 P. 599, 62 Kan. 666.

—— *Defenses.*—The statute of limitations barring an action for relief on the ground of fraud in two years after the discovery of the fraud bars only the "right of action," and does not prevent one who has been injured by the fraud from pleading such fraud as a shield to protect himself from the action of another. Thomas v. Rauer, 64 P. 80, 62 Kan. 568.

Under Civ. Code, § 18, subd. 3, barring an action on the ground of fraud in two years after accrual of the cause of action, and declaring that the cause of action shall not be deemed to have accrued until after the discovery of the fraud, a defense in which it is sought to avoid a written agreement, and reform the same, on the ground of fraud, is barred after two years from

discovery of the fraud. McCormick Harvesting Mach. Co. v. Hayes (Kan. App.) 49 P. 632.

Limitations run only from the time of discovery, or from time when the defrauded party, with ordinary diligence, might have discovered the fraud. Farmers' State Bank of Ada v. Keen (Okl.) 167 P. 207.

The statute of limitations does not bar an action for fraud until two years after the fraud has been discovered. Mohr v. Sands, 44 Okl. 330, 133 P. 238. Plaintiff residing in New York was not charged with notice of fraud practiced on her by her attorney in Nebraska, so as to start the statute of limitations because the records of the Nebraska courts would show fraud, where the attorney was acting for her in the matter concerning which the record was made, and she had no means of ascertaining what the records would show, except from her attorney. Id.

In action for relief on ground of fraud, whether for rescission or damages, limitations do not commence to run until discovery of fraud. Gillies v. Linscott, 157 P. 423, 98 Kan. 78, judgment affirmed on rehearing 160 P. 213, 99 Kan. 215.

The statute of limitations does not commence to run against an action for false representations of authority to contract until discovery of the fraud. Pierson v. Holdridge, 140 P. 1032, 92 Kan. 365.

Where a casualty policy different from that applied for has been fraudulently issued, reformation is not barred until two years after the fraud is discovered. Hammond v. Western Casualty & Guaranty Ins. Co., 165 P. 291, 100 Kan. 582.

In an action to set aside an order approving an administrator's final account based on a release procured through fraud, limitations do not run until discovery of the fraud. Pickens v. Campbell, 159 P. 21, 98 Kan. 518.

Diligence—Constructive notice.—To start limitations running against an action for fraud, the fraud is deemed to be discovered whenever it is discoverable by the exercise of diligence reasonably to be expected of one in the position of the person defrauded. Duphorne v. Moore, 107 P. 791, 82 Kan. 159.

Fraud is deemed to be discovered, within the statute of limitations, when, in the exercise of reasonable diligence, it could have been discovered; and where a creditor knew of the execution of a deed, which he supposed named his debtor as grantee, reasonable diligence would have required an examination of the record, which would have disclosed the fact that it was executed to the debtor's wife. Donaldson v. Jacobitz, 72 P. 846, 67 Kan. 244. An action to set aside a deed to a debtor's wife as fraudulent, and to subject the property to the payment of the debt, is barred in two years from the time, where the creditor knew of the execution of the deed when it was made, but supposed it named his debtor as grantee. Id.

In action for relief on ground of fraud, constructive notice is sufficient to start the running of the statute of limitations, within the meaning of the Code provision that such an action is deemed to have accrued upon the "discovery of the fraud." Davis v. Heynes, 105 Kan. 75, 181 P. 566.

In an action for damages from fraudulent representations as to irrigation rights, held, that the plaintiff had shown ordinary diligence to discover the fraud, and that the action was not barred, because not brought within two years from the time the fraud, if any, was discovered. Mateer v. Great Western Land Co., 137 P. 786, 91 Kan. 349.

Where, in an action against defendants on the ground of fraud of the ad-

This statutory limitation only applies where the party against whom the bar is interposed is required to allege fraud in pleading his cause of action, or to prove fraud to entitle himself to relief.[35] It has no application to actions for relief on the ground of duress by threats.[36]

The phrase "until discovery of the fraud," does not mean actual notice, as constructive notice is sufficient; and, where the means of discovery lie in public records required by law to be kept, they

ministrator of an estate on whose bond they were sureties, it appeared that in 1882 under an order of the probate court the land of the decedent was sold, a sale was confirmed, and that the administrator filed an account at that time crediting himself with a number of items, showing no balance in his hands as administrator, and that there were no debts requiring the sale of the land and that the items credited to the administrator were false, the action was barred; the records of the probate court involving the transactions complained of being constructive notice of the alleged fraud sufficient to set in motion the two-year statute of limitations. Walline v. Olson, 113 P. 426, 84 Kan. 37.

Where an action for relief on the ground of fraud is brought by children against their mother, as administratrix of her husband and their guardian, eighteen years after the estate was settled, and eight years after the guardian's account was closed, a finding that the fraud was discovered by actual examination of the mother's accounts within two years from the date of the action is not a sufficient finding to remove the case from the operation of limitations. Black v. Black, 68 P. 662, 64 Kan. 689. Under Civ. Code, § 18, par. 3, limitation of two years, in actions for relief against fraud, after "discovery of the fraud," is not to be determined by actual notice; and where the means of discovery lies in the public records required to be kept, and which involve the very transaction in hand, they are sufficient constructive notice to set the statute in motion. Id.

The rule that, if an examination of the public records would reveal a fraud, the records are constructive notice sufficient to set limitations in motion, does not obtain in favor of a vendee who procured his conveyance by fraudulent representations as to the state of the record on which the vendor relied. Hutto v. Knowlton, 108 P. 825, 82 Kan. 445.

The record of a deed executed to defraud creditors held not to give notice of the fraud. Underwood v. Fosha, 152 P. 638, 96 Kan. 549, Ann. Cas. 1917A, 265.

[35] Logan v. Brown, 95 P. 441, 20 Okl. 334, 20 L. R. A. (N. S.) 298.

The limitation of the time within which an action for relief on the ground of fraud must be commenced applies only when the party against whom the bar is interposed is required to allege fraud in pleading his cause of action, or to prove fraud, to entitle him to relief. Brown v. Cloud County Bank, 42 P. 593, 2 Kan. App. 352.

[36] Eureka Bank v. Bay, 135 P. 584, 90 Kan. 506.

are sufficient to set the statute in motion.[37] But one standing in a relation of trust is bound to disclose the real facts, and a defrauded party is not charged with constructive discovery of the fraud because the facts are a matter of public record.[38]

Where a statutory quitclaim deed, instead of a warranty deed, was fraudulently given, the grantee, who read and accepted it, was charged with notice of its character, and limitations began to run from the date of acceptance.[39]

A record of a deed is not notice to the grantor of the fraudulent inclusion therein of land other than that intended to be conveyed, so as to start running of limitations.[40]

Where the evidence, in an action by trustees for relief on account of fraud, fails to show that such fraud was not known to one of the plaintiffs, or to their predecessors, more than two years prior to the commencement of the action, plaintiffs cannot recover.[41]

In an action by a creditor for relief on the ground of fraud of his debtor, it is necessary to establish ignorance of the fraud until the time within the period limited for the commencement of an action to remove the bar of limitations.[42]

The statute of limitations does not begin to run against an agent, for misappropriation, until discovery by the principal of the defalcation.[43]

The limitation of time within which an action may be brought in form in ejectment, but in substance for relief on the ground of fraud, is two years after the discovery of the fraud, subject to being tolled as in other cases, and not the fifteen-year limitation.[44]

An action for balance due from a guardian to his ward when the

[37] Board of Com'rs of Garfield County v. Renshaw, 99 P. 638, 23 Okl. 56, 22 L. R. A. (N. S.) 207.

[38] Farmers' State Bank of Ada v. Keen (Okl.) 167 P. 207.

Registration of deed procured from ignorant and illiterate grantor by false pretense that it was a rental contract, did not constitute constructive notice of fraud sufficient to set limitations in motion against grantor. Ford v. Perry (Okl.) 168 P. 221.

[39] Jones v. Woodward, 50 Okl. 704, 151 P. 586.

[40] Webb v. Logan, 48 Okl. 354, 150 P. 116.

[41] Manley v. Robertson, 51 P. 795, 6 Kan. App. 921.

[42] Fuller v. Horner, 77 P. 88, 69 Kan. 467.

[43] Guernsey v. Davis, 73 P. 101, 67 Kan. 378.

[44] New v. Smith, 119 P. 380, 86 Kan. 1.

latter reached the age of majority is not an action for relief for fraud, within the two-year statute of limitations though the petition contains allegations that certain charges against the ward in the annual accounts are erroneous.[45]

An action by a trustee in bankruptcy to set aside conveyances made by a bankrupt with intent to defraud creditors is an action for relief on the ground of fraud.[46]

Where one who is entitled to an accounting against another, and who has the express promise of such other to account, fails to institute his action within the statute of limitations, he cannot take his case out of such statute by alleging a fraudulent conspiracy between his adversary and a third person to refuse such accounting.[47]

The fact that defendant, after defrauding plaintiff out of his property, absconded from the state, and that plaintiff was unable to discover her whereabouts, is not equivalent to a failure by plaintiff to discover the fraud.[48]

§ 365. —— Foreign judgment—Bonds, etc.

"Fourth. Within one year: An action on a foreign judgment; an action for libel, slander, assault, battery, malicious prosecution, or false imprisonment; an action upon a statute for penalty or forfeiture, except where the statute imposing it prescribes a different limitation.[49]

[45] Hawk v. Sayler, 83 Kan. 775, 112 P. 602.

[46] Harrod v. Farrar, 74 P. 624, 68 Kan. 153.

[47] Rizer v. Board of Com'rs of Geary County, 48 P. 568, 58 Kan. 114.

[48] Myers v. Center, 27 P. 978, 47 Kan. 324.

[49] An action on a foreign judgment must be brought within one year from the time the right of action accrues. Bank of Stockham v. Weins, 71 P. 1073, 12 Okl. 502.

Illustrations—Kansas cases.—A mortgage was executed and recorded, and afterwards paid and satisfied. On several occasions, the mortgagor demanded that the mortgagee should enter satisfaction of record, but the mortgagee failed, and after more than one year from the time of making the first demand, but within less than one year after making the last demand, the mortgagor sued to recover the penalty provided for by section 8 of the act relating to mortgages. Held, that plaintiff's cause of action was given by and his action founded on "a statute for a penalty," and, his action not having been brought within one year after his cause of action accrued, it was barred before his action was commenced. Joyce v. Means, 20 P. 853, 41 Kan. 234.

A proceeding to amerce a sheriff under is governed by Code Civ. Proc. § 18, subd. 4, prescribing the time within which actions on a statute for a pen-

"Fifth. An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff or any other officer, or upon the bond or undertaking given in attachment, injunction, arrest or in any case whatever required by the statute can only be brought within five years after the cause of action shall have accrued.[50]

alty or forfeiture must be begun. Fuller v. Wells, Fargo & Co., 22 P. 561, 42 Kan. 551.

A petition against a railroad company alleged that defendant had charged plaintiff for the transportation of merchandise a greater rate than it charged other persons, and asked judgment for three times the amount of the overcharge. A demurrer having been sustained, an amended petition was filed, leaving out the demand for triple damages, and asking to recover actual damages only. Held that, under the rule that when the language of a petition is of doubtful import, and it is challenged before trial by a demurrer, the pleading must be construed against the pleader, on the ground that he should make his meaning clear, the petition must be construed as having been based, not on the common-law liability of the carrier for discrimination, but on Gen. St. 1889, pars. 1333, 1342, making it unlawful for a railroad company to charge any person for transportation of property a greater sum than it shall charge any other person, and making it liable to the person so overcharged in three times the amount of damages; and the action is therefore barred in one year, under Code, § 18, subd. 4, requiring an action upon a statute for a penalty to be brought within one year. Beadle v. Kansas City, Ft. S. & M. R. Co., 29 P. 696, 48 Kan. 379.

The action for a penalty for failure to discharge of record a mortgage that has been paid is barred in one year, where a demand for such discharge is not made within that time after payment. Wey v. Schofield, 36 P. 333, 53 Kan. 248.

An action under Gen. St. 1889, par. 406, by a depositor against an officer for receiving deposits, knowing the bank to be insolvent, is an action for a penalty, barred in one year. Ashley v. Frame, 45 P. 927, 4 Kan. App. 265, judgment reversed Frame v. Ashley, 53 P. 474, 59 Kan. 477.

The reciprocal demurrage act (Laws 1905, c. 345), provides that when a shipper applies for cars, the carrier must furnish them within a specified time, subject to a forfeiture of $1 per day for each car failed to be furnished. Held, in an action under the act, that the one-year statute of limitations applies. Udall Milling Co. v. Atchison, T. & S. F. Ry. Co., 108 P. 137, 82 Kan. 256.

An action under Gen. St. 1889, c. 25, § 39, against a county commissioner for the recovery of unauthorized fees, is an action on a statute for a penalty, within Gen. St. 1889, c. 80, § 18, subd. 4, limiting the bringing of such actions to one year from the accrual of the cause of action. Roe v. Board of Com'rs of Elk County, 40 P. 1082, 1 Kan. App. 219.

An action to recover for injuries sustained by a negligent shooting is barred within one year. Byrum v. Edwards, 71 P. 250, 66 Kan. 96.

[50] The time within which an action may be brought against a guarantor for breach of a guaranty contained in a paving contract with a city for the contractor's failure to pay for material and labor is fixed by Rev. Laws 1910, §

"Sixth. An action for relief, not hereinbefore provided for, can only be brought within five years after the cause of action shall have accrued." [51]

This provision applies to an action brought in district court to determine the title to a fund in county court,[52] to the time within which the purchaser at a tax sale may maintain an action against the county clerk to compel the issuance of a second tax deed, the deed first issued being invalid,[53] and to an action against a railroad company to recover compensation for all damages sustained by reason of the permanent taking and appropriation of the right of way,[54] but not to a proceeding in probate to sell real estate to pay debts.[55]

§ 366. —— Action for recovery of estate sold by guardian

"No action for the recovery of any estate, sold by a guardian, can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof." [56]

§ 367. —— Liens

"A lien is extinguished by the mere lapse of the time within which, under the provisions of civil procedure, an action can be brought upon the principal obligation." [57]

4657, limiting actions on bonds, not by section 3882. United States Fidelity & Guaranty Co. v. Star Brick Co., 54 Okl. 103, 153 P. 1122.

Bond to state for use of lienors whose liens accrued under Laws Kan. 1909, c. 183, § 1, in connection with contract for erection of public building, held a bond to supersede mechanics' liens, to which the general statute of limitation applies, and not the special statute. (Gen. St. Kan. 1915, § 7570 [Code Civ. Proc. Kan. § 662]). Capital Iron Works Co. v. Chicago Bonding & Surety Co., 171 P. 612, 102 Kan. 699.

[51] Rev. Laws 1910, § 4657.

[52] Yockey v. Yockey, 148 P. 665, 95 Kan. 519.

[53] Young v. Gibson, 105 P. 3, 80 Kan. 264, 81 Kan. 185.

[54] Atchison, T. & S. F. R. Co. v. Lauterback, 54 P. 11, 8 Kan. App. 15.

[55] Thomas v. Williams, 80 Kan. 632, 103 P. 772, 25 L. R. A. (N. S.) 1304.

[56] Rev. Laws 1910, § 6583.

[57] Rev. Laws 1910, § 3844.

§ 368. —— Liens against railroads

Liens of mechanics, builders, artisans, workmen, laborers and other persons against railroads, "shall not be effectual unless suit shall be brought upon the claim within one year after it accrued." [58]

§ 369. —— Actions against notaries

"No suit shall be instituted against any such notary or his securities more than three years after the cause of action accrues." [59]

§ 370. —— Rejected claim

"When a claim is rejected, either by the executor or administrator, or the judge of the county court, the holder must bring suit in the proper court, according to its amount, against the executor or administrator, within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim is forever barred." [60]

§ 371. Vacancy in administration

"The time during which there shall be a vacancy in the administration, must not be included in any limitation herein prescribed." [61]

§ 372. Action against sureties on bond

"No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within three years from the discharge or removal of the guardian; but if at the time of such discharge the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed." [62]

[58] Rev. Laws 1910, § 3869.

[59] Rev. Laws 1910, § 4249.

Cause of action against notary public and sureties on his bond for making false certificate of acknowledgment on June 8, 1909, accrued then, and when not brought until July 31, 1915, was barred by three-year limitations. Oklahoma Farm Mortgage Co. v. Jordan (Okl.) 168 P. 1029.

[60] Rev. Laws 1910, § 6344.

[61] Rev. Laws 1910, § 6347.

[62] Rev. Laws 1910, § 6582.

§ 373. Actions for wrongful death

An action for wrongful death must be commenced within two years.[63]

§ 374. Assessments—Suits to set aside

"No suit shall be sustained to set aside any such assessment, or to enjoin the mayor and council from making any such improvement, or levying or collecting any such assessment, or installment thereof, or interest or penalty thereon, or issuing such bonds, or providing for their payment," as authorized in chapter 10, article 12, providing for street improvements, "or contesting the validity thereof on any ground, or for any reason other than for the failure of the city council to adopt and publish the preliminary resolution provided for in cases requiring such resolution and its publication, and to give the notice of the hearing on the return of the appraisers, unless such suit shall be commenced not more than sixty days after the passage of the ordinance making such final assessment." [64]

"No suit shall be sustained to set aside any assessment or certificate issued in pursuance of any assessment or to enjoin the city council or town board from making any improvement, unless brought within sixty days after the passage of the ordinance making such assessment." [65]

[63] Rev. Laws 1910, § 5281; Rodman v. Missouri Pac. Ry. Co., 70 P. 642, 65 Kan. 645, 59 L. R. A. 704; Harwood v. Chicago, R. I. & P. Ry. Co., 171 P. 354, 101 Kan. 215.

[64] Rev. Laws 1910, c. 10, § 644.

[65] Rev. Laws 1910, § 471; Warner-Quinlan Asphalt Co. v. Smith (Okl.) 173 P. 516.

Suit cannot be maintained to set aside assessment for street improvement, because amount includes an overpayment to contractor if suit is commenced more than 60 days after passage of ordinance making final assessment. Crosslin v. Warner-Quinlan Asphalt Co. (Okl.) 177 P. 376.

Though mayor and council adopt resolution for paving improvement during the 15 days from last publication of preliminary resolution of necessity within which protest may be filed, action to enjoin collection of special assessments, begun more than 60 days after final assessment ordinance, was barred by special statute of limitations (Rev. Laws 1910, § 644). Bickel v. Warner-Quinlan Asphalt Co. (Okl.) 174 P. 537. Where mayor and council granted petition for paving purporting to be signed by requisite number of owners, and gave legal notice of hearing on appraisers' return, without protest as to sufficiency of petition, an action, begun more than 60 days after final assessment ordinance, to enjoin collection because petition was not signed by requisite number of owners, was barred by special statute of limitations (Rev. Laws 1910, § 644). Id.

This statute is not applicable as a bar to an action to enjoin collection of assessment when proceedings on which it is passed are void.[66]

This statute does not deprive persons of property without due process of law,[67] or impair the obligation of contracts.[68]

§ 375. Demand—Tender

Where a demand is required to perfect a cause of action, it must be made within a reasonable time, and the statute of limitations cannot be extended by delay in making demand.[69]

Where a contract binds the purchaser on demand to set apart and convey lots as part of the price, the statute of limitations does not begin to run until a demand and failure to comply therewith.[70]

Where property is received by the provisional government of a city, and appropriated to its own use, and later is appropriated to the use of the incorporated city taking its place, the statute of limitations does not run, as against the owner of the property, until after a demand has been made therefor.[71]

An action for specific performance of a contract to convey realty not fixing time for performance accrues when the purchaser within reasonable time tenders performance, and the vendor refuses performance, and the statute of limitations runs from that time.[72]

§ 376. Actions for usurious interest

The action must be brought within two years after the maturity of the usurious contract, when brought under the statute providing in part that the taking, receiving, reserving or charging a rate of interest greater than is allowed by law "shall be deemed a forfeiture of twice the amount of interest which the note, bill or other

[66] Southern Surety Co. v. Jay (Okl.) 178 P. 95; City of Muskogee v. Nicholson (Okl.) 171 P. 1102; Grier v. Kramer, 62 Okl. 151, 162 P. 490.

A provision under the city charter prescribing the time within which action must be brought to secure relief against an assessment for street improvements held not to apply in the case of a void assessment made against a lot. Flanagan v. City of Tulsa, 55 Okl. 638, 155 P. 542.

[67] City of Chickasha v. O'Brien, 58 Okl. 46, 159 P. 282.

[68] City of Chickasha v. O'Brien, 58 Okl. 46, 159 P. 282.

[69] Purcell Bank & Trust Co. of Purcell v. Byars (Okl.) 167 P. 216.

[70] Kee v. Satterfield, 46 Okl. 660, 149 P. 243.

[71] City of Guthrie v. T. W. Harvey Lumber Co., 60 P. 247, 9 Okl. 464.

[72] Skidmore v. Leavitt (Okl.) 175 P. 503.

evidence of debt carries with it, or which has been agreed to be paid thereon. In case a greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover from the person, firm or corporation taking or receiving the same in an action in the nature of an action of debt twice the amount of the entire interest paid." [73]

Under this statute an action to recover the forfeiture prescribed for usury must be brought within two years after the maturity of the usurious contract, or from maturity of last renewal note given on the contract.[74]

If usurious interest has been paid, it can only be recovered in separate action brought therefor within two years.[75]

§ 377. Tax deed

The statute providing that an action to avoid a tax deed shall be commenced within one year after the recording of the deed does not apply to an action to avoid a void tax deed.[76]

§ 378. Nonresident alien landowners

"All nonresident aliens who may hereinafter acquire real estate in Oklahoma by devise, descent or by purchase, where such purchase is made under any legal proceeding foreclosing liens in favor of such alien, may hold the same for five years from the date of so acquiring such title." [77]

[73] Rev. Laws 1910, § 1005, amended by Sess. Laws 1916, p. 24, § 1.

[74] First State Bank v. Pool (Okl.) 167 P. 760.

[75] Daniels v. Bunch (Okl.) 172 P. 1086; First State Bank v. Pool (Okl.) 167 P. 760; Ardmore State Bank v. Lee, 61 Okl. 169, 159 P. 903.

Const. art. 14, § 3, and Rev. Laws 1910, §§ 1005, 4660, intended that limitation prescribed within which action to recover twice the usurious interest paid must be brought be subject to same tolling provisions of statute applying to other actions for debt. Bean v. Rumrill (Okl.) 172 P. 452.

[76] Union Savings Ass'n v. Cummins (Okl.) 177 P. 901; Rev. Laws 1910, § 7419.

[77] Rev. Laws 1910, § 6648.

ARTICLE V

SUSPENSION AND TOLLING OF STATUTE

Sections
379. Suspension of statute in general.
380. Disability.
381. Infancy.
382. Person of unsound mind.
383. Suspension of statute by death.
384. Absence or flight.
385. Nonresidence.
386. Concealment.
387. Of person.
388. Return.
389. Fraud or fault.
390. Ignorance, mistake, and duress.
391. Revivor.

§ 379. Suspension of statute in general

It will not suspend the running of the statute that the subject of an action is held in custodia legis in another action to which defendant is neither a party nor in privity with a party and over which he has no control,[78] or that an appeal is pending from the final order and judgment of the district court to the Supreme Court, in the absence of a supersedeas,[79] or that a composition is effected,[80] or that the defendant is declared a bankrupt, where the plaintiff participated in the dividends.[81]

Where legal proceedings restrain one party from exercising a legal remedy against another, the running of the limitations is postponed or suspended during such restraint.[82]

[78] Hawkins v. Brown, 97 P. 479, 78 Kan. 284.

[79] Bank of Stockham v. Weins, 12 Okl. 502, 71 P. 1073.

[80] Dobson v. Noyes, 18 P. 697, 39 Kan. 471.

[81] Simpson v. Tootle, Wheeler & Motter Mercantile Co., 141 P. 448, 42 Okl. 275, L. R. A. 1915B, 1221.

[82] City of Hutchinson v. Hutchinson, 141 P. 589, 92 Kan. 518, 52 L. R. A. (N. S.) 1165.

The running of the statute of limitations against a judgment against a township will be suspended during the operation of a supersedeas bond in favor of the township staying the issuance of execution thereon. Ware v. Pleasant Grove Tp., 59 P. 1089, 9 Kan. App. 700.

An order at chambers on a motion of a mortgagee discharging an attachment obtained by a creditor of a chattel mortgagor, and to reverse which pro-

The statute does not run during the pendency of an action,[83] if the causes of action are identical.[84]

ceeding in error was brought, did not prevent the mortgagee from suing the creditor for conversion so as to suspend the running of limitations as against such action. McDonald v. Symns Grocer Co., 67 P. 1111, 64 Kan. 529.

In order that the pendency of other proceedings may toll the statute of limitations the proceedings must be such as to prevent the enforcement of the remedy by action. Harrison v. Scott, 95 P. 1045, 77 Kan. 637. Limitations will run on a cause of action in favor of a stockholder of an insolvent corporation for contribution from his co-stockholders based on a claim in his favor against the corporation, notwithstanding an action against him on his double liability in which he seeks to set off the same cause of action. Id.

A right of action accrues on plaintiff's undertaking in replevin when he fails to comply with the judgment rendered against him, and the statute begins to run from the rendition of the judgment even though plaintiff prosecutes a proceeding in error without giving a supersedeas bond to reverse the judgment. Delay v. Yost, 53 P. 482, 59 Kan. 496.

[83] Where, before action on a judgment in favor of a corporation was barred by limitation, a receiver was appointed and brought an action on the judgment, which remained pending until his discharge, the statute of limitations does not run during the pendency of the action. Chicago & A. Bridge Co. v. Fowler, 39 P. 727, 55 Kan. 17.

Where proceedings to enforce stockholders' liability and obtain executions against them are brought before the judgment against the corporation becomes dormant, and are diligently prosecuted, no statute of limitations will run against the judgment creditor pending the litigation, and his right to proceed to the end will not be barred because more than six years have elapsed since the last execution on the judgment was issued. Steffins v. Gurney, 59 P. 725, 61 Kan. 292.

Where a corporation which has purchased the business and assumed the liabilities of an individual is impleaded with the individual in an action to recover an indebtedness growing out of the business and while such action, which finally results in a judgment against the corporation, is pending, the corporation resells to another corporation, which in turn assumes the liabilities of the former, the statute of limitations does not begin to run in favor of stockholders of the latter corporation so long as the creditor is prosecuting with reasonable diligence actions to establish the liability of the successive purchasers. Walterscheid v. Bowdish, 96 P. 56, 77 Kan. 665.

Where a suit by a claimant to mortgaged premises brought in 1891 to quiet title and cancel the mortgage was removed to the United States court, and in 1897 remanded to the state court, and neglected for ten years, and where, in 1908, a grantee of the mortgagor procured judgment quieting title against plaintiff, but no judgment was taken against the mortgagee answering, held, that the right of the assignee of the mortgage to foreclose by cross-petition in 1910 was not barred by the five-year statute of limitations. City of Hutchinson v. Hutchinson, 141 P. 589, 92 Kan. 518, 52 L. R. A. (N. S.) 1165.

[84] An action for compensation for property destroyed by fire negligently set by railroad is not brought on same cause of action as one to recover amount agreed to be paid in compromise and pendency of action on such agreement

The absence from the state of the principal does not suspend the running of the statute of limitations in favor of the sureties on an administrator's bond; they are severally liable, and are severally entitled to the protection of the statute.[85]

§ 380. Disability

"Any person entitled to bring an action for the recovery of real property, who may be under any legal disability when the cause of action accrues, may bring his action within two years after the disability is removed." [86]

Where disability to sue exists when the right of action accrues, the statute of limitations does not begin to run during continuance of the disability.[87] But generally, the statute having once attach-

does not suspend statute of limitations as against the action on the tort. Thompson v. Missouri, K. & T. Ry. Co., 171 P. 629, 102 Kan. 668.

[85] Davis v. Clark, 49 P. 665, 58 Kan. 454.

[86] Rev. Laws 1910, § 4656.

Where the purchaser of land at a void guardian's sale went into possession and he and those claiming under him remained continuously in possession thereafter an action by the minor to recover such land was barred, when not brought within five years after the recording of the guardian's deed, or within two years after removal of plaintiff's disability. Dodson v. Middleton, 38 Okl. 763, 135 P. 368.

Plaintiff sued within two years after coming of age, on a single cause of action for ejectment, partition, and the recovery of rents and profits. A share of the land descended to plaintiff when he was a minor. Defendants, tenants in common, had long held exclusive possession under a claim of absolute ownership, and they and their ancestor had so held adversely to plaintiff for more than fifteen years before suit. Held, that as the principal purpose of the action was to determine the title held by the adverse claimants, and the other grounds of relief asked are incidental, it falls within the statute, which permits such action within two years after the disability of infancy is removed. Delashmutt v. Parrent, 18 P. 712, 39 Kan. 548.

The statute provides that an action for the recovery of real estate, not thereinbefore provided for, shall be brought within fifteen years. The statute provides that any person entitled to bring an action for the recovery of real property, who may be under any legal disability when the cause of action accrues, may bring his action within two years after the disability is removed. Held, that an action by a minor to recover land sold fifteen years before by her guardian is barred, if the minor reached her majority two years before bringing the action. Howbert v. Heyle, 27 P. 116, 47 Kan. 58.

A right of action in ejectment for the recovery of land sold by an administrator, brought by an heir of a deceased person, is saved to a minor who may sue within two years after the disability of infancy has been removed. Thompson v. Burge, 57 P. 110, 60 Kan. 549, 72 Am. St. Rep. 369.

[87] Title Guaranty & Surety Co. v. Cowen (Okl.) 177 P. 563.

ed, the period will continue to run without suspension by any subsequent disability, unless the statute so provides.[88]

An adjudication in bankruptcy under the Bankruptcy Act of 1898, as amended (U. S. Comp. St. §§ 9585–9656), does not put the creditor under a "legal disability," as to an action in a state court on a provable claim.[89]

The phrase "under legal disability" includes a person imprisoned.[90]

"If a person entitled to bring an action other than for the recovery of real property, except for a penalty or forfeiture, be, at the time the cause of action accrued, under any legal disability, every such person shall be entitled to bring such action within one year after such disability shall be removed." [91]

§ 381. Infancy

Under statutes of limitations, excepting persons under disabilities, but not specifically excepting infants, they are within the saving clause, though an infant has a guardian who might maintain an action in his own name, where the right of action is in the infant.[92]

A cause of action in favor of an infant, for personal injuries sustained, may be brought at any time during infancy, and will in no event be barred by the two-year limitation until one year after the disability of infancy has been removed.[93]

Where an action is commenced by a Creek freedman allottee while still a minor, as defined by Act Cong. May 27, 1908, against a former guardian and surety for proceeds of sale of allotted lands, limitations have not been set in motion to bar the relief sought.[94]

Where a tenant in common with four others was a minor, and was ousted of his possession by the grantee of the four, who took

[88] Overstreet v. Wichita Falls & N. W. R. Co. (Okl.) 175 P. 354.

[89] Simpson v. Tootle, Wheeler & Motter Mercantile Co., 141 P. 448, 42 Okl. 275, L. R. A. 1915B, 1221.

[90] State v. Calhoun, 32 P. 38, 50 Kan. 523, 18 L. R. A. 838, 34 Am. St. Rep. 141.

[91] Rev. Laws 1910, § 4658.

[92] Hinton v. Trout (Okl.) 172 P. 450; Title Guaranty & Surety Co. of Scranton, Pa., v. Burton (Okl.) 170 P. 1170.

[93] Missouri Pac. Ry. Co. v. Cooper, 45 P. 587, 57 Kan. 185.

[94] Brewer v. Dodson, 60 Okl. 81, 159 P. 329; Brewer v. Perryman, 62 Okl. 176, 162 P. 791.

all the rents and profits for several years, and, as soon as he arrived at the age of maturity, commenced an action for partition and for rents and profits, such action is not barred by the statute of limitations.[95]

Limitations do not begin to run against an action to set aside a void conveyance of Indian minor allottee, executed after May 27, 1908, until the minor has attained majority, as shown by enrollment records of the Commissioner to the Five Civilized Tribes.[96]

§ 382. Person of unsound mind

Limitations will not run in favor of a person claiming under a deed made by one mentally unsound and under the undue influence of the grantee.[97]

An insane person is under disability, within the meaning of the statute of limitations, though the question of his sanity has never been adjudicated.[98]

§ 383. Suspension of statute by death

The running of limitations in favor of an adverse possessor of land is not suspended by the death of the opposing claimant and descent of the cause of action to minor heirs.[99]

As against heirs of a grantor of unsound mind, who so continues until his death, limitations do not begin to run until such death.[1]

The death of a debtor ordinarily suspends the running of the statute until the appointment of an administrator,[2] but the statute will run on a demand against the estate after a reasonable time has elapsed after death, though no executor or administrator has been appointed,[3] and the death of a debtor does not amount to an indefinite suspension of the statute.[4]

[95] Scantlin v. Allison, 4 P. 618, 32 Kan. 376.
[96] Bell v. Fitzpatrick, 53 Okl. 574, 157 P. 334.
[97] Howard v. Carter, 80 P. 61, 71 Kan. 85; Jenkins v. Jenkins, 146 P. 414, 94 Kan. 263.
[98] Lantis v. Davidson, 56 P. 745, 60 Kan. 389.
[99] Campbell v. Dick (Okl.) 157 P. 1062.
[1] Jenkins v. Jenkins, 146 P. 414, 94 Kan. 263.
[2] Nelson v. Herkel, 2 P. 110, 30 Kan. 456.
[3] Black v. Elliott, 65 P. 215, 63 Kan. 211, 88 Am. St. Rep. 239.
[4] The maker of a note secured by a mortgage removed from the state after

A cause of action for the foreclosure of a mortgage does not accrue on the death of the mortgagor and the allowance by the probate court of the note secured by the mortgage, as a demand against the estate, without regard to the maturity of the mortgage debt, and it does not set limitations running against such action.[5]

Under Federal Employers' Liability Act, § 6 (U. S. Comp. St. § 8662), limiting an action to two years from accrual of the cause, a personal representative appointed more than two years from the death of the employé cannot maintain an action.[6]

§ 384. Absence or flight

"If, when a cause of action accrues against a person, he be out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the state, or abscond, or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."[7]

This statute applies to an action to recover twice the amount of interest paid on an usurious contract.[8] It applies to actions con-

the maturity of the note, and was absent until his death. No administration was ever had on his estate, nor were any steps taken to enforce the collection of the secured debt until about 10 years after his death, when an action to foreclose the mortgage was begun. Held, that the action was barred. Culp v. Culp, 32 P. 1118, 51 Kan. 341, 21 L. R. A. 550.

Under Gen. St. 1889, par. 2796, a creditor of a decedent having a claim which he wishes to establish against the estate, may, if the widow or next of kin refuse to take out letters of administration, obtain letters for himself or some other person, after 50 days from the death of decedent; and he cannot, without any good cause or reason therefor, defer making such application until the statute of limitations has run, and then claim that all of the time from the death of the debtor to the appointment of the administrator the statute of limitations is suspended on account of the nonappointment of such administrator. Bauserman v. Charlott, 26 P. 1051, 46 Kan. 480.

[5] Linn v. Ziegler, 75 P. 489, 68 Kan. 528.

[6] Giersch v. Atchison, T. & S. F. Ry. Co. (Kan.) 171 P. 591.

[7] Rev. Laws 1910, § 4660.

When a cause of action arises, limitations in the country where the obligor resides immediately begin to run, and, if in another country than the state of Kansas, an action on a contract is not barred by limitations in Kansas, unless the bar of limitations has fallen in such other country. Hays Land & Investment Co. v. Bassett, 116 P. 475, 85 Kan. 48.

[8] Bean v. Rumrill (Okl.) 172 P. 453.

cerning real property as well as to personal actions,[9] provided the action is not strictly in rem and no personal service is required.[10]

The fact of personal presence in the state, and not of domicile, controls.[11]

[9] Chicago, K. & N. Ry. Co. v. Cook, 22 P. 988, 43 Kan. 83.

The statute of limitations does not run on a cause of action for the recovery of real property, while the person who claims title thereto is absent from the state. Corby v. Moran, 49 P. 82, 58 Kan. 278; Ard v. Wilson, 54 P. 511, 8 Kan. App. 471, judgment affirmed 56 P. 80, 60 Kan. 857.

Code Civ. Proc. § 15 (Gen. St. 1897), excluding the period of a defendant's absence from the state from the time of commencing actions against him, applies to a defendant in ejectment claiming title by adverse possession, though he had possession through a tenant during such absence. Ard v. Wilson, 56 P. 80, 60 Kan. 857, affirming judgment 54 P. 511, 8 Kan. App. 471.

The running of limitations, as against grantee assuming a mortgaged debt, may be suspended by the absence of the grantee from the state. Hendricks v. Brooks, 101 P. 622, 80 Kan. 1, 133 Am. St. Rep. 186.

Limitation does not run against a mortgage foreclosure suit against a nonresident, though the plaintiff is in possession of the mortgaged premises as grantee of the mortgagor. Smith v. Perkins, 63 P. 297, 10 Kan. App. 577.

Where the statute of limitations is pleaded as a defense to a mortgage foreclosure suit, and the court finds that the defendant left the state within two years after the execution of the mortgage, and remained a nonresident thereafter, it is not error to refuse to make finding as to when the first default occurred, since the cause of action did not mature until the plaintiff declared the debt due, and the defendant's nonresidence prevented the running of limitations. Id.

Where, in an action for the recovery of land, plaintiff claims under a tax deed, and contends that the irregularities in the proceedings are cured by the running of the statute of limitations after the recording of the deed, defendant may show that plaintiff, since the recording of the deed, has been absent from the state, and therefore cannot invoke the protection of the statute. Case v. Frazier, 3 P. 497, 31 Kan. 689.

[10] Absence from the state on the part of a tax deed holder will not prevent the tax law from so operating as to bar any suit or proceeding brought against the tax deed holder, or his heirs or assigns, for the recovery of the property, or to defeat or avoid the tax deed, if such suit or proceeding is not commenced within five years from the time of the recording of the tax deed. Beebe v. Doster, 14 P. 150, 36 Kan. 666.

The absence from the state of the owner of real estate upon which there is a mortgage, but nor which he is not personally liable, will not prevent the statute of limitations from running against the mortgage lien. Hogaboom v. Flower, 72 P. 547, 67 Kan. 41.

[11] Investment Securities Co. v. Bergthold, 58 P. 469, 60 Kan. 813, following Hoggett v. Emerson, 8 Kan. 262; Vanselous v. McClellan, 57 Okl. 742, 157 P. 923; Dixon v. Windscheffel, 129 P. 938, 88 Kan. 824; Miller v. Baier, 72 P. 772, 67 Kan. 292.

The residence out of the state which suspended the running of the Illinois statute of limitations was the fixed abode entered into with the intention to

§ 385. Nonresidence

The statute of limitations operates to bar all actions, except as against persons and corporations upon whom notice of the action cannot be served because of their being out of the state.[12] It does not run in favor of a nonresident until summons can be served within the state and a valid personal judgment had, which can be enforced as provided by law.[13]

The statute does not run in favor of a nonresident corporation which neglects to comply with the laws of the state within which it is permitted to transact business, by reason of which neglect it is saved from service of process.[14]

If notice of an action can be served during the whole of a prescribed period and a personal judgment obtained, which can be enforced as provided by law, then such person or corporation is not "out of the state," within the statute.[15]

remain permanently at least for a time for business or other purposes. Fidelity & Deposit Co. v. Sheahan, 133 P. 228, 37 Okl. 702, 47 L. R. A. (N. S.) 309. To constitute a "residence out of the state" sufficient to suspend the running of the Illinois statute of limitations, it was not necessary that there should be an actual change of domicile in the strict legal sense, but it was necessary that a fixed and permanent abode or dwelling place out of that state should have been acquired at least for the time being. Id.

[12] St. Louis & S. F. R. Co. v. Taliaferro (Okl.) 168 P. 788, L. R. A. 1918B, 994.

Though one who assigns a mortgage note and guaranties payment within two years of maturity can stand in place of the maker, and, like him, invoke the statute of limitations, it is unavailing where the running of the statute has been suspended by the continuous absence of the maker from the state from the time of giving the note. Spink v. Newby, 67 P. 437, 64 Kan. 883.

[13] Bean v. Rumrill (Okl.) 172 P. 453.

Where a nonresident purchases property after statement for mechanic's lien has been filed and her deed is duly recorded and no personal liability can be enforced against her, her absence from state does not extend time within which lien may be foreclosed. Bixeman v. Warren (Okl.) 173 P. 443.

[14] Johnson & Larimer Dry-Goods Co. v. Cornell, 46 P. 860, 4 Okl. 412; Oklahoma Nat. Bank v. Chicago, R. I. & P. Ry. Co., 45 Okl. 707, 146 P. 716; St. Louis & S. F. Ry. Co. v. Keiffer, 48 Okl. 434, 150 P. 1026; Hale v. St. Louis & S. F. R. Co., 39 Okl. 192, 134 P. 949, L. R. A. 1915C, 544, Ann. Cas. 1915D, 907; Williams v. Metropolitan St. Ry. Co., 74 P. 600, 68 Kan. 17, 64 L. R. A. 794, 104 Am. St. Rep. 377, 1 Ann. Cas. 6.

[15] St. Louis & S. F. R. Co. v. Taliaferro (Okl.) 168 P. 788, L. R. A. 1918B, 994.

In action by city against foreign company, surety on contractor's bond, surety at commencement of action held not an absent corporation within Code Civ. Proc. § 20 (Gen. St. 1915, § 6910), so as to be precluded from urg-

The time defendant is out of the state after a cause of action has accrued against him cannot be computed as part of the period within which the action must be brought.[16]

Where a defendant, against whom a cause of action for fraud accrues, is at that time absent in another state, limitations does not begin to run as to him until his return to this state.[17]

§ 386. Concealment

A party who wrongfully conceals material facts, or the fact that a cause of action has accrued against him, cannot plead limitations.[18]

However, mere failure to disclose that a cause of action exists will not prevent the running of limitations. There must be some actual artifice to prevent knowledge of facts, or some affirmative act of concealment.[19]

One seeking to toll the statute of limitations by reason of the fraudulent concealment of the facts out of which his action arises must exercise reasonable diligence.[20]

ing the statute of limitations as a defense. City of Topeka v. Ritchie, 102 Kan. 384, 170 P. 1003.

An action of ejectment by a tax deed holder out of possession does not become barred by the two-year statute of limitation, while occupied by tenants, agents, or employés of a nonresident owner. Gibson v. Hinchman, 83 P. 981, 72 Kan. 382.

[16] Ament v. Lowenthall, 35 P. 804, 52 Kan. 706.

[17] Sherman v. Havens, 86 Kan. 99, 119 P. 370.

[18] Oklahoma Farm Mortgage Co. v. Jordan (Okl.) 168 P. 1029; Weems v. Melton, 47 Okl. 706, 150 P. 720; Atchison, T. & S. F. Ry. Co. v. Atchison Grain Co., 70 P. 933, judgment modified 75 P. 1051, 68 Kan. 585, 1 Ann. Cas. 639; McMullen v. Winfield Building & Loan Ass'n, 67 P. 892, 64 Kan. 298, 56 L. R. A. 924, 91 Am. St. Rep. 236; Zinkeison v. Lewis, 66 P. 644, 63 Kan. 590; Stinson v. Aultman, Miller & Co., 38 P. 788, 54 Kan. 537; Stewart v. Bank of Indian Territory, 75 P. 1055, 68 Kan. 755; Gano v. Martin, 61 P. 460, 10 Kan. App. 384.

The statute does not begin to run in favor of an agent, and against his principal, until the principal has knowledge of some wrong committed by the agent inconsistent with his rights as principal. Perry v. Smith, 2 P. 784, 31 Kan. 423; Same v. Wade, 2 P. 787, 31 Kan. 428.

[19] Oklahoma Farm Mortgage Co. v. Jordan (Okl.) 168 P. 1029; Waugh v. Guthrie Gas, Light, Fuel & Improvement Co., 131 P. 174, 37 Okl. 239, L. R. A. 1917B, 1253.

[20] Lewis v. Duncan, 71 P. 577, 66 Kan. 306.

§ 387. —— Of person

The provision that, when a cause of action accrues against a person who has "absconded or concealed" himself, the period limited for the commencement of the action shall not begin to run while he is so absconded or concealed, does not apply to a cause of action arising in another state from which defendant absconded to this state, where she made no effort to conceal her whereabouts while within the state.[21]

§ 388. —— Return

That, after a debtor has moved from the state, limitations may run in his behalf during a temporary return, it is not necessary that such visit shall be made so as to give the creditor an opportunity to serve summons on him, but he is entitled to credit for all the time spent in the state unless he conceals himself.[22]

§ 389. Fraud or fault

In order to shorten the time within which an action must be brought, defendants cannot set up their own fraud,[23] or fault estopping them from pleading limitations.[24]

§ 390. Ignorance, mistake, and duress

For the purpose of determining the time when limitations commenced to run against an action to correct a mistake in a deed, the record of the deed does not impart notice of the mistake.[25]

[21] Myers v. Center, 27 P. 978, 47 Kan. 324.

Defendant absconded from Iowa, where the debt sued on was contracted, and came to Kansas, where he lived openly. His creditor thorugh reasonably diligent, had failed to discover his whereabouts. Held, that the word "conceal," as used in the Kansas statute of limitations, applied to acts of a party in Kansas. Frey v. Aultman, Miller & Co., 2 P. 168, 30 Kan. 181.

[22] Baxter v. Krause, 101 P. 467, 79 Kan. 851, 23 L. R. A. (N. S.) 547.

Before a debtor who is absent from the state when a cause of action accrues, and who makes occasional visits to the state during the period of limitations, can set up a bar of the statute, the times of his temporary presence in the state must aggregate the statutory period. Gibson v. Simmons, 94 P. 1013, 77 Kan. 461. Where a debtor is out of the state when a cause of action accrues against him, limitations do not begin to run until he comes into the state, and it will continue to run so long as he remains in the state; but if, after he comes into the state, he again departs from it, the running of the statute remains suspended during his absence. Id.

[23] People of State of New York v. Ettenson, 56 P. 749, 60 Kan. 858.

[24] School Dist. No. 5 v. First Nat. Bank, 66 P. 630, 63 Kan. 668; Missouri, K. & T. Ry. Co. v. Pratt, 85 P. 141, 73 Kan. 210, 9 Ann. Cas. 751.

[25] Jackson-Walker Coal & Material Co. v. Miller, 129 P. 1170, 88 Kan. 763.

While the lapse of time will bar equitable relief against a mistake in describing land conveyed, limitations will not run till the discovery of the mistake, or the time at which, by reasonable diligence, it might have been discovered.[26]

Limitations do not commence to run against an action for relief on the ground of duress by threats while the mind of the aggrieved party continues to be dominated by the threats.[27]

§ 391. Revivor

A mere order of revivor is sufficient to prevent the running of limitations.[28]

Where an action is revived in due time after the death of plaintiff, in the name of his administrator, but the petition is not amended so as to show the death of plaintiff and the succession of the administrator to his rights for more than five years thereafter, the statute of limitations does not run during the interval between the revivor of the action and the filing of the amended petition.[29]

ARTICLE VI

EXTENSION AND WAIVER

Sections

392. Failure otherwise than on merits.
393. Extension.
394. Acknowledgment.
395. Extension agreement.
396. Part payment.
397. Waiver of limitations.

§ 392. Failure otherwise than on merits

"If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for

[26] Jackson-Walker Coal & Material Co. v. Miller, 129 P. 1170, 88 Kan. 763; Duvall v. Simpson, 36 P. 330, 53 Kan. 291.

An action filed in August, 1907, to recover money paid by mistake in 1898, was barred by limitations, where the mistake was discovered in December, 1903. Nicholson v. Nicholson, 146 P. 340, 94 Kan. 153.

[27] Eureka Bank v. Bay, 135 P. 584, 90 Kan. 506.

[28] McLain v. Parker, 129 P. 1140, 88 Kan. 717, judgment affirmed on rehearing 131 P. 153, 88 Kan. 873.

[29] Kansas City, W. & N. W. R. Co. v. Menager, 54 P. 1043, 59 Kan. 687.

the same shall have expired, the plaintiff, or if he die, and the cause of action survive, his representatives, may commence a new action within one year after the reversal or failure." [30]

This statute applies to an action which has failed otherwise than on its merits, though the time limited had not expired at the time of such failure.[31] For this statute to operate, a right of ac-

[30] Rev. Laws 1910, § 4662.

Where a party sues for relief on the ground of fraud and on the trial, by leave, dismisses the action without prejudice, more than two years after his right of action accrued, and brings a second action within one year from the dismissal of the first, the bar of the statute is not let in. Wilson v. Wheeler, 115 P. 1117, 28 Okl. 726.

Before the statute of limitations had run upon notes, an action thereon was begun, which was thereafter, and before trial, dismissed without prejudice. During the pendency of the action the notes were transferred to another. An action thereon was brought more than five years after maturity, but within one year after the dismissal of the former suit. Held, that the right of action thereon was not barred. Anthony Inv. Co. v. Law, 61 P. 745, 62 Kan. 193; reversing judgment 58 P. 1116, 9 Kan. App. 890.

The holder of a note brought suit on it in a county wherein one of the makers resided and served him. A summons was also sent to another county and served on another maker who resided there. The holder believed in good faith that he had a valid cause of action against the local maker who was not joined for the mere purpose of obtaining jurisdiction over the other maker. Pending further proceedings, the makers' attorney convinced the holder that the action against the one residing in the county wherein the note had been sued was barred by the statute of limitations, and the action was subsequently dismissed as to that maker. Thereafter the maker in the other county moved that the summons and service on him be set aside, which was done, and the entire proceeding dismissed. Held, that the action was commenced, and that the holder of the note failed otherwise than on the merits. Parker v. Dobson, 96 P. 472, 78 Kan. 62.

Where a demurrer to a petition was sustained on the ground of misjoinder of causes, and without other pleading a judgment was entered that defendant was the owner and entitled to the possession of the property in question, the plaintiff, having commenced his action in due time, failed therein otherwise than on the merits. New v. Smith, 119 P. 380, 86 Kan. 1.

Where a plaintiff recovered judgment before a justice, and again on appeal to the district court, but such judgment was reversed and the action dismissed by the supreme court, on the ground that the amount involved was beyond the jurisdiction of the justice, the action "failed otherwise than upon the merits." Ball v. Biggam, 49 P. 678, 6 Kan. App. 42.

[31] Swift & Co. v. Hoblawetz, 61 P. 969, 10 Kan. App. 48; Knox v. Henry, 55 P. 668, 8 Kan. App. 313.

Where an action against a notary is commenced within three years and dismissed without a hearing on the merits, a new suit commenced within one year on the same cause is not barred. Clapp v. Miller, 56 Okl. 29, 156 P. 210.

Where a person sues to enforce a mechanic's lien while under a disability

tion must have existed when the first suit was brought,[32] and must have been pleaded,[33] and the action not be for a cause of action which has accrued to the plaintiff subsequent to the causes set forth in his original action,[34] and summons must have been served.[35] The actions must be substantially the same.[36]

This statute applies only when a party would be otherwise barred from action by the statute of limitations relating to the cause of action.[37] It has no application to revivor proceedings; and hence an unsuccessful attempt to obtain an order reviving a judgment does not operate to extend the time within which such an order may be made.[38]

The plaintiff cannot, in new action brought within a year, ingraft causes that are barred upon causes pleaded in the first action that are not barred.[39]

Where a party sues for services rendered, and a judgment in his favor is subsequently reversed, and the case dismissed without prejudice, a suit within one year to recover for the same services, where reliance is had solely on an oral contract, is not such a departure from the first action, setting up a contract partly oral and partly in writing, as to let in the statute of limitations.[40]

depriving him of his right to sue because of failure to pay a city occupation tax, and then dismisses the suit without prejudice, after which he obtains a pardon, he may, within a year after such dismissal, institute a new suit on the same claim. Draper v. Miller, 140 P. 890, 92 Kan. 275, rehearing denied 141 P. 1014, 92 Kan. 695.

On the dismissal for want of a previous demand of an action brought to recover the penalty prescribed for refusal to release a chattel mortgage, a second action, brought within one year after dismissing the first, is not barred, though not brought within one year after demand made. Hall v. Hurd, 19 P. 802, 40 Kan. 374.

An action to foreclose a mechanic's lien, which was commenced within one year after the dismissal of a prior action without prejudice, was not barred by the statute, though more than one year had elapsed since the filing of the lien. Hobbs v. Spencer, 31 P. 702, 49 Kan. 769.

[32] Smith v. Bourbon County Com'rs, 23 P. 642, 43 Kan. 619.

[33] Becker v. Atchison, T. & S. F. Ry. Co., 78 P. 408, 70 Kan. 193.

[34] Hatchell v. Hebeisen, 82 P. 826, 16 Okl. 223.

[35] O'Neil v. Eppler, 162 P. 311, 99 Kan. 493.

[36] McGlinchy v. Bowles, 75 P. 123, 68 Kan. 190.

[37] English v. T. H. Rogers Lumber Co. (Okl.) 173 P. 1046.

[38] Berkley v. Tootle, 64 P. 620, 62 Kan. 701.

[39] Brice-Nash v. Hutchinson Interurban Ry. Co., 102 Kan. 36, 169 P. 189.

[40] Myers v. First Presbyterian Church of Perry, 69 P. 874, 11 Okl. 544.

Where the new action is dismissed more than one year after the first dismissal, there is no authority for the bringing of another new action.[41]

Where in an action it was determined that plaintiff could not maintain the same, because of an oral agreement not to sue until other litigation was terminated, in an action after the termination of such other litigation defendants could not plead that limitations had barred the action; the decision in the first case suspending limitations until the action was determined.[42]

§ 393. Extension

"In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby." [43]

§ 394. —— Acknowledgment

An acknowledgment, to bar the statute of limitations, must be unequivocal and without qualification, and a direct admission of a present existing liability.[44] It must itself be unqualified and

[41] Denton v. City of Atchison, 90 P. 764, 76 Kan. 89.

[42] Dendy v. Russell, 114 P. 239, 84 Kan. 377.

[43] Rev. Laws 1910, § 4663.

A written acknowledgment of a balance due on a mortgage will extend the time within which the action might be brought for three years after the date of such acknowledgment. Cleveland Paper Co. v. Mauk, 54 P. 1035, 8 Kan. App. 562.

[44] Durban v. Knowles, 71 P. 829, 66 Kan. 397.

Sufficient acknowledgment.—The payee of a note who has assigned it as collateral security has such an interest therein that a written acknowledgment made to him by the debtor will toll limitations. Girard Trust Co. v. Owen, 112 P. 619, 83 Kan. 692, 33 L. R. A. (N. S.) 262.

Where the grantee accepts a deed, and by a contract not set forth in the deed agrees to pay the grantor's debt secured by a mortgage on the land, he is liable in an action by the mortgagee, though a recovery on the mortgage note would be barred by limitations but for such an acknowledgment of the debt by the mortgagor as tolled the statute as to him if such acknowledgment was made before the conveyance. Disney v. Healy, 85 P. 287, 73 Kan. 326.

A statement to a cashier of a bank holding a note for collection, at the time payment was made by the person making such statement, that he is liable

for one-half of the note and interest, though he is neither the maker nor indorser of the note, is sufficient to toll the statute of limitations as to him. Miller v. McDowell, 77 P. 101, 69 Kan. 453.

A postal card sent through the United States mail by the defendant, and directed to plaintiff, which read as follows: "I will turn you over Farmer's notes for the note you hold against me, the Frys' note. Let me hear from you" —was an acknowledgment of an existing liability, debt, or claim, and the time for complete operation of the statute was extended for five years after that time. Pracht v. McNee, 18 P. 925, 40 Kan. 1.

A letter written by defendant to plaintiff, in which he states: "I think you are a little mistaken about my notes amounting to over $800. Even at compound interest, they would not amount to that much. The whole amount, $600, on interest one year at 8 per cent., would only be $48, and for three years would be $144, making a grand total of $744"—and assumes that the amount of the notes will be deducted from his share of an estate of which plaintiff is administrator, is a sufficient acknowledgment to stop the running of the statute of limitation. Clarke v. King, 38 P. 281, 54 Kan. 222.

Where a petition on a note had letters attached which were alleged to have been written by one of the makers to the payee offering to deed land in consideration of the release of the note and mortgage and the return of the note, it is a sufficient acknowledgment of the debt to toll the statutes. Disney v. Healy, 85 P. 287, 73 Kan. 326.

Insufficient acknowledgment.—An answer acknowledging the execution and delivery of a certain note, without more, does not acknowledge that such note was then a subsisting obligation. McMillan v. Leeds, 49 P. 159, 58 Kan. 815.

A surety having signed a note payable to the order of a bank, afterwards executed his own note to the bank for the full amount of the first note, across which the bank wrote, "Received of A., surety, $1,949.04 in full payment," and handed to the surety, to collect from the principal, with the agreement that he was to turn over the amount collected, and assign the judgment to the bank, upon doing which he was to receive his own note, which was held simply as security. Held, that the new note was not an acknowledgment of indebtedness for the first note, nor a promise by the surety to pay that. Gragg v. Barnes, 4 P. 276, 32 Kan. 301.

The acknowledgment of liability by a city on a warrant issued in payment for a sidewalk built in front of a private lot was not shown by a recital, in a resolution authorizing an assessment against the lot for the sidewalk tax, that the warrant had been issued by the city for the cost of the walk and bore interest from date, since an acknowledgment must be of a subsisting liability, and be made to the holder of the debt, or his representative. King v. City of Frankfort, 43 P. 983, 2 Kan. App. 530.

Letter expressing regret at inability to pay account held insufficient to constitute acknowledgment of debt. Corbett v. Hoss, 157 P. 1195, 98 Kan. 290; Hamilton v. Beaubien, 142 P. 245, 92 Kan. 944.

A letter written by the maker of a note and a mortgage securing it, stating that, if he could keep the land a year longer, he thought he could make a half payment in a year, and, if he could not, he would be glad to give up the land, and requesting that he be given a "show," is not an acknowledgment of an existing debt or liability which will toll the statute. Wood v. Merrietta, 71 P. 579, 66 Kan. 748.

An acknowledgment in writing that a debt once existed, but which does not

direct, and not dependent for its meaning on some other writing, or on a possible construction of its own language.[45]

After such acknowledgment, the action is not brought upon the acknowledgment, but upon the original debt.[46]

§ 395. —— Extension agreement

An express promise made by the grantee suspends the running of limitations against the foreclosure of a mortgage lien.[47] An extension agreement made with one having no interest in the mortgage will not interrupt the running of the statute of limitations on the mortgage, as against a purchaser from the maker of the extension agreement.[48]

Where a note has been extended by agreement, limitations will not commence to run against an action thereon until the expiration of the extension.[49]

Where one of two makers procures an extension for payment of a note providing for its extension without releasing either, the

contain an admission of a present subsisting debt on which the party is liable, is insufficient to remove the bar of limitation. Hawkins v. Brown, 97 P. 479, 78 Kan. 284.

A letter written by the maker of two notes, due in 30 and 60 days, respectively, to the holder, in reference to a matter of "business" between them, in which he offered to give his note, payable in one year, for a sum less than one-half of the two notes, is not a sufficient acknowledgment of liability on the notes to remove the bar of the statute. Andrew v. Kennedy, 46 P. 485, 4 Okl. 625.

A promise to pay a debt barred by the statute as soon as the debtor was able was not such an acknowledgment as would take the debt out of the statute. Dezell v. Thayer, 44 P. 686, 2 Kan. App. 587.

A letter written by a defendant to plaintiff, wherein he states that he is bound that the plaintiff shall get his pay, but which does not describe the debt, or show that it is a subsisting debt, owing by defendant to plaintiff, will not operate to take the debt out of the operation of the statute of limitations. O'Riley v. Finigan, 58 P. 281, 9 Kan. App. 889.

A writing stating that the writer had made a mortgage, and suggesting to the holder ways in which he might escape loss by taking care of the property mortgaged, is not such "an acknowledgment of an existing debt or liability" as to remove the bar of the statute. Haythorn v. Cooper, 69 P. 333, 65 Kan. 338, judgment reversed Cooper v. Haythorn, 70 P. 581, 65 Kan. 860.

[45] Richards v. Hayden, 57 P. 978, 8 Kan. App. 816.

[46] Cleveland Paper Co. v. Mauk, 54 P. 1035, 8 Kan. App. 562.

[47] Neosho Valley Inv. Co. v. Huston, 59 P. 643, 61 Kan. 859.

[48] Investment Securities Co. v. Bergthold, 58 P. 469, 60 Kan. 813.

[49] Sedgwick v. Sanborn, 65 P. 661, 63 Kan. 884.

statute of limitations runs from first maturity of the note in favor of the maker not a party to the extension agreement.[50]

§ 396. —— Part payment

The statute is tolled by a part payment in money or its equivalent, or the giving of a note,[51] or the giving and acceptance of a credit.[52] The part payment may be only interest,[53] and written

[50] Hurley v. Gray, 103 Kan. 345, 173 P. 919.

[51] An action for a balance due on a note is not barred; there being a part payment made by him on the note within five years, by the giving of a second note. Pracht v. McNee, 18 P. 925, 40 Kan. 1.

[52] A credit on a note, such as will toll the statute, must evidence a voluntary payment. Berry v. Oklahoma State Bank, 50 Okl. 484, 151 P. 210, L. R. A. 1916A, 731. A credit on a note of the proceeds of the sale of securities held not to toll the statute. Id.

Credit of debt owing by creditor to debtor is sufficient to lift bar of limitations, when made with consent of debtor. Ross v. Lee (Okl.) 172 P. 444.

A credit entered in a book of accounts by the creditor, after the account had been barred by the statute of limitations, is not sufficient to establish such a partial payment as will revive the account. Hamilton v. Coffin, 26 P. 42, 45 Kan. 556.

A creditor cannot prevent the running of the statute of limitations by the arbitrary allowance of a credit on the debt of which his debtor had no knowledge and to which he had not in some manner given his assent. Atchison, T. & S. F. Ry. Co. v. Atchison Grain Co., 70 P. 933, judgment modified 75 P. 1051, 68 Kan. 585, 1 Ann. Cas. 639.

A receipt indorsed on a note, after action is barred by limitations, does not indicate part payment, which will revive liability. Liphart v. Myers, 156 P. 693, 97 Kan. 686; Easter v. Easter, 24 P. 57, 44 Kan. 151.

It is the payment of a portion of a debt which tolls the statute of limitations, and not the actual indorsement of such payment on the instrument evidencing such debt. Hastie v. Burrage, 77 P. 268, 69 Kan. 560.

Where a mortgagee of land in possession applies the rents therefrom to taxes and repairs, and indorses the balance as payments upon the mortgage note, with the mortgagor's consent, but without any direction to do so, or other authority than as implied from such facts, the indorsements will not remove the bar of the statute of limitations. Shanks v. Louthan, 99 P. 613, 79 Kan. 363, 131 Am. St. Rep. 294.

The action of plaintiff in voluntarily placing to the credit of a defunct partnership a sum collected will not interrupt in his own favor the running of limitations as to an action for a partnership accounting and settlement. Brooks v. Campbell, 155 P. 41, 97 Kan. 208, Ann. Cas. 1918D, 1105.

An indorsement of a partial payment, without the knowledge or authority of the surety, from moneys derived from the sale of property pledged by the principal, does not take the note out of the operation of the statute of limitations as to the surety. Peru Plow & Wheel Co. v. Ward, 51 P. 805, 6 Kan. App. 289.

[53] See note 53 on following page.

indorsement of the interest payment is not essential.[54] It may have been made by a natural guardian or parent for a minor,[55] or by a legal guardian[56] or trustee in bankruptcy,[57] or by an assignee for the benefit of creditors.[58] But the payment by the clerk of the distributive share of a scheduled creditor of a fund paid into court by an assignee for the benefit of creditors, after the discharge of the assignee, is not such part payment as to stop the running of limitations.[59]

The running of limitations will not be interrupted by a payment where there is any uncertainty as to the identity of the debt on which it was made.[60]

A part payment, to toll the statute of limitations, must have been made as part payment by the obligor, or some one at his direction, and under such circumstances as to amount to an acknowledgment of an existing liability.[61]

[58] McLane v. Allison, 56 P. 747, 60 Kan. 441, reversing judgment 53 P. 781, 7 Kan. App. 263; Spink v. Newby, 67 P. 437, 64 Kan. 883.

A mortgage is regarded as an incident to the note, and, where the note and mortgage are once barred, payment of interest on the note revives both the note and the mortgage so far as it affects the interests of the payors and continues it a valid lien superior to the rights of subsequent lienors. Clark v. Grant, 109 P. 234, 26 Okl. 398, 28 L. R. A. (N. S.) 519, Ann. Cas. 1912B, 505.

Where a person purchased land, and assumed the payment of a mortgage thereon, and paid interest on the mortgage debt for several years after it became due, such payments were sufficient to prevent the running of the statute of limitations on the debt. Woodruff v. Albright, 62 P. 250, 10 Kan. App. 113.

[54] Topeka Capital Co. v. Merriam, 56 P. 757, 60 Kan. 397.

[55] Perry v. Horack, 64 P. 990, 63 Kan. 88, 88 Am. St. Rep. 225.

[56] First Nat. Bank v. Bangs, 136 P. 915, 91 Kan. 54, judgment affirmed on rehearing 140 P. 896, 92 Kan. 270, and objections to taxation of costs sustained 141 P. 1013, 92 Kan. 1031.

[57] Simpson v. Tootle, Wheeler & Motter Mercantile Co., 141 P. 448, 42 Okl. 275, L. R. A. 1915B, 1221.

[58] Letson v. Kenyon, 1 P. 562, 31 Kan. 301.

[59] Smith-Frazer Boot & Shoe Co. v. White, 51 P. 790, 7 Kan. App. 11; White v. Smith-Frazier Boot & Shoe Co., 32 P. 632, 51 Kan. 34.

[60] Brock v. Corbin, 146 P. 1150, 94 Kan. 542.

[61] Good v. Ehrlich, 72 P. 545, 67 Kan. 94.

A payment made upon a note by a stranger thereto and without authority from the maker does not toll limitations. Kelsay v. Kelsay Land Co., 64 Okl. 291, 166 P. 173.

Where a mortgagor was in default for nonpayment of the first of a series of notes, and for nonpayment of taxes, the running of limitations was not suspended by payment of the taxes by a subsequent purchaser from the mort-

A part payment to a mortgagee who has made an unrecorded assignment is sufficient to toll limitations.[62]

Partial payments by one debtor on a note will not suspend the running of the statute of limitations in favor of the other debtors thereon, although the party paying be the principal debtor and the others only sureties.[63]

gagor. Snyder v. Miller, 80 P. 970, 71 Kan. 410, 69 L. R. A. 250, 114 Am. St. Rep. 489.

Husband and wife.—A mortgage on a homestead was given by a husband and wife to secure the husband's note. The latter paid interest without the knowledge of the wife. Within five years after the last payment an action was brought to foreclose. Held, that the mortgaged land was subject to sale for payment of the note. Skinner v. Moore, 67 P. 827, 64 Kan. 360, 91 Am. St. Rep. 244.

A husband and wife executed a mortgage note, and the husband died, having previously conveyed title to his wife, who rented the farm to her son-in-law, and thereafter died. The son-in-law and wife continued in possession, and within five years from maturity of the note made a small payment, and continued in possession until action to foreclose was brought, with the acquiescence of the brothers and sisters of the wife, and he, with her consent, made several payments on the debt and paid the taxes from the proceeds of the crops raised on the land. No interval of five years elapsed between such payments. Held, that the payments prevented the running of limitations in favor of any of the heirs against the debt. Ellis v. Snyder, 112 P. 594, 83 Kan. 638, 32 L. R. A. (N. S.) 253.

A husband and wife jointly executed a note, and secured the same by a mortgage on real estate belonging to the wife. The note became barred as to the wife by the statute of limitations, but not as to the husband, he having made payments which tolled the statute. Held, that the mortgage could be foreclosed, and the wife's land sold to pay the judgment rendered against the husband. Jackson v. Longwell, 64 P. 991, 63 Kan. 93.

G. and his wife borrowed money from a loan company, and, to secure such loan, gave a mortgage on real estate owned by the wife; the proceeds of such loan being used to pay off a mortgage held by M. upon such real estate. Prior to the execution and delivery of the mortgage given to the loan company, the wife had been adjudged insane, and the husband appointed as her guardian. The fact of the wife's insanity was fraudulently concealed from the company, and it had no actual notice of such insanity. Payments of interest were made upon the mortgage given to the loan company within less than five years prior to the commencement of foreclosure proceedings upon such mortgage. Held, that the payment of interest by G. was sufficient to toll the statute. Gano v. Martin, 61 P. 460, 10 Kan. App. 384.

[62] Girard Trust Co. v. Owen, 112 P. 619, 83 Kan. 692, 33 L. R. A. (N. S.) 262.

[63] Hurley v. Gray, 103 Kan. 345, 173 P. 919; McMillan v. Leeds, 49 P. 159, 58 Kan. 815.

Partial payments made by one debtor on a note will not suspend the running of the statute of limitations in favor of the other debtors thereon. Wellington Nat. Bank v. Thomson, 59 P. 178, 9 Kan. App. 667.

Where one of two joint makers of a note makes a payment thereon after it is due as the agent of the other and with his money, and states that the money belongs to his co-obligor for whom he is paying it, it does not affect the operation of limitations as to himself.[64]

When one of two partners sells out to the other who assumes the firm indebtedness, his part payment of a note given by partners prior to such sale for a partnership debt tolls the statute of limitations as to the other maker; the payee having had no notice of the dissolution.[65]

Where land is purchased by a firm, which assumes a mortgage thereon, and title is taken in the individual names of the partners, and the partnership ceases to do business, and one partner attempts to convey an undivided one-half interest in the land, the other partner may pay a portion of the mortgage debt and thus extend the running of limitations on the mortgage as to the entire tract.[66]

Where stockholders and officers of a corporation give a note for money for the corporation, and pay interest for nine years out of corporate funds, they cannot avail themselves of limitations on the theory that they are sureties, and have personally made no payments.[67]

Where limitations have run against a claim, the payment of part of it by way of compromise and settlement, in consideration of release in full, does not remove the bar of the statute as to remainder.[68]

The payment dates from the time paid, and not from the time of indorsement when there is a difference.[69]

§ 397. Waiver of limitations

The statute may be waived. Where a board of education entered into a valid agreement to apply the judgment fund to judgments in the order of entry, and complied therewith, it could not, after the expiration of the statutory period when the judgment

[64] Elmore v. Fanning, 117 P. 1019, 85 Kan. 501, 38 L. R. A. (N. S.) 685.
[65] Campbell v. Herrick, 104 Kan. 657, 180 P. 237.
[66] McKee v. Covalt, 81 P. 475, 71 Kan. 772; Bucher v. Same, Id.
[67] Gordon v. Russell, 158 P. 661, 98 Kan. 537.
[68] Nolan v. Board of County Com'rs of Ellis County, 101 Kan. 513, 168 P. 326.
[69] Benton v. Yurann, 55 P. 676, 8 Kan. App. 305.

became dormant for failure to issue execution, plead limitations as a bar to those judgments not yet reached for payment under the agreement.[70]

Where default had commenced to run for nonpayment of a mortgage note and taxes, a purchaser from the mortgagor did not waive the right to plead limitations by subsequently paying the taxes.[71]

ARTICLE VII

CONTRACT LIMITATIONS

Sections
398. In general.
399. Insurance policy.
400. Mutual accident and sickness insurance

§ 398. In general

A provision of an interstate shipment contract that the shipper must bring his action within six months is reasonable, valid, and binding.[72]

§ 399. Insurance policy

A provision in the standard form of fire insurance policy, limiting the right to sue on a policy to one year, is enforceable, where no extrinsic facts excuse delay in commencing the action. The period of limitation begins to run against an action on such a policy from the day of the fire, though the policy provides the loss shall not become payable until 60 days after notice, ascertainment, estimate, and proof of loss have been received by the insurer.[73]

A provision of an insurance policy that no suit or action on the policy shall be maintainable unless commenced not later than six months,[74] is void; and as to causes of action arising before the

[70] In re Board of Education of City of Perry, 130 P. 951, 35 Okl. 733.

[71] Snyder v. Miller, 80 P. 970, 71 Kan. 410, 69 L. R. A. 250, 114 Am. St. Rep. 489.

[72] St. Louis & S. F. R. Co. v. Pickens, 51 Okl. 455, 151 P. 1055; St. Louis, I. M. & S. Ry. Co. v. Bentley (Okl.) 176 P. 250.

[73] Rev. Laws 1910, § 3482; Wever v. Pioneer Fire Ins. Co., 49 Okl. 546, 153 P. 1146, L. R. A. 1918F, 507.

[74] Rev. Laws 1910, § 977; Oklahoma Fire Ins. Co. v. Wagester, 38 Okl. 291, 132 P. 1071.

adoption of the standard policy in 1909, a limitation to twelve months after the fire, or loss, was void.[75]

§ 400. —— Mutual accident and sickness insurance

Any mutual accident and sickness insurance company "may limit the time within which suit may be brought against it or any claim based upon its policies or certificates of membership, and after the expiration of the time thus limited, shall not be liable therefor: Provided, such limitation shall be incorporated in, and form a part of the contract between the corporation, association or society and the assured or its members, and provided further that such limitation shall not be limited to a period of less than one year from the time such right of action accrues." [76]

[75] Keys v. Phœnix Ins. Co., 132 P. 820, 37 Okl. 514; Keys & Keys v. Williamsburg City Fire Ins. Co. of Brooklyn, N. Y., 132 P. 818, 37 Okl. 482; Same v. Mechanics' & Traders' Ins. Co. of New Orleans, La., 132 P. 819, 37 Okl. 480; Seay v. Commercial Union Assur. Co. Limited. of London, England, 140 P. 1164, 42 Okl. 83.

[76] Sess. Laws 1913, p. 230, § 14.

CHAPTER VIII

PARTIES

Sections
401–406. Article I.—In general.
407–423. Article II.—Plaintiff.
424–436. Article III.—Defendant.
437–439. Article IV.—Intervener.
440–443. Article V.—Defects, objections, and amendments.

ARTICLE I

IN GENERAL

Sections
401. Designation of parties.
402. Counties—Dental board.
403. Married women.
404. Joinder—Necessary parties.
405. Where parties numerous.
406. Style.

§ 401. Designation of parties

The omission of or a mistake in an initial does not affect the jurisdiction of the court, where the right party is served and has appeared.[1]

One may, without abandoning real name and without fraudulent intent, adopt any name by which he may transact business, execute contracts, and sue and be sued.[2]

One may lawfully change his name without resort to legal proceedings, and for all purposes the name so assumed will constitute his legal name as if he had borne it from birth.[3]

The law does not generally recognize a middle name, but looks rather to the identity of the individual, and when this identity is established, this is all that the law requires.[4]

[1] Maine v. Edmonds, 58 Okl. 645, 160 P. 483.

[2] Badger Lumber Co. v. Collinson, 156 P. 724, 97 Kan. 791.

The sole owner and manager of a business may in good faith conduct his business under any name, and sue under such name for breach of contract. Robinovitz v. Hamill, 44 Okl. 437, 144 P. 1024, L. R. A. 1915D, 981.

[3] Modern Brotherhood of America v. White (Okl.) 168 P. 794, L. R. A. 1918B, 520.

[4] Maine v. Edmonds, 58 Okl. 645, 160 P. 483.

Ordinarily, identity of name is prima facie evidence of identity of person, and it devolves upon those who deny the identity to overcome the presumption by proof.[5]

Two names, though spelled differently, if they sound alike or so nearly alike that the attentive ear finds difficulty in distinguishing them, are regarded as the same.[6]

§ 402. Counties—Dental board

A county may sue and be sued.[7]

"The board of dental examiners may sue or be sued under the name of the state board of dental examiners of Oklahoma; and no suit shall abate by reason of any change of membership of the board." [8]

§ 403. Married women

"A married woman may sue and be sued in the same manner as if she were unmarried." [9]

"Woman shall retain the same legal existence and legal person-

[5] Bayha v. Munford, 49 P. 601, 58 Kan. 445.

[6] Maine v. Edmonds, 58 Okl. 645, 160 P. 483.

The names "Mollie Brown" and "Mary Brown" are the same, and constitute only one name, and the administering of medicines and drugs to Mollie Brown was the administering of such medicines to Mary Brown; it apppearing that no claim was made in the court below that Mollie Brown was not Mary Brown, and no question was raised in reference thereto. State v. Watson, 1 P. 770, 30 Kan. 281.

Idem sonans.—"Johnston" and "Johnson" are idem sonans. Miltonvale State Bank v. Kuhnle, 31 P. 1057, 50 Kan. 420, 34 Am. St. Rep. 129.

"Barbara" and "Barbra" are idem sonans. State v. Haist, 34 P. 453, 52 Kan. 35.

The names "Bert" and "Burt" are idem sonans. State v. Johnson, 79 P. 732, 70 Kan. 861.

In ejectment against a defendant described as "Ned Armstead," in which plaintiff derives title through a judgment against one designated as "Ned Almstead" and "Ned Olmstead," the testimony of the officer who served the summons in the action in which such judgment was rendered, that such service was made on the defendant in the ejectment action justifies treating "Almstead" and "Olmstead" as different spellings of the name "Armstead." Armstead v. Jones, 80 P. 56, 71 Kan. 142.

[7] Rev. Laws 1910, § 1497.

Where Rev. Laws 1910, § 1497, requires action to be instituted in name of county, reference must be made to section 1500, requiring county to sue in name of "Board of County Commissioners of the County of ———." Smith v. State, 13 Okl. Cr. 619, 166 P. 463.

[8] Rev. Laws 1910, § 6828.

[9] Rev. Laws 1910, § 4684.

ality after marriage as before marriage, and shall receive the same protection of all her rights as a woman, which her husband does as a man; and for any injury sustained to her reputation, person, property, character or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone." [10]

§ 404. Joinder—Necessary parties

"Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason being stated in the petition." [11]

Where a firm of two attorneys bring action on an oral contract for services, refusal to bring in as a party another attorney who was in partnership with plaintiffs in another firm was not error.[12]

The shipper of live stock, under a written contract obligating him to hold the carrier harmless for any damages it might be required to pay the caretaker accompanying the stock, is not a necessary party to an action by the caretaker against the carrier for personal injuries.[13]

In order to obtain the rescission of a contract of sale, all parties interested in the property involved must be brought before the court.[14]

[10] Rev. Laws 1910, § 3363.

[11] Rev. Laws 1910, § 4692.

It was alleged that plaintiffs, L. and husband, owned and resided on a homestead, and that the husband executed a conveyance of the same to H., without consent of his wife; that subsequently H. and his wife, Lydia, executed a deed with the usual covenants to P. The action to set aside both conveyances was brought against H. and P., without joining as a defendant Lydia H. Held, that she is a necessary party plaintiff in the action to cancel the deed in which she joined as grantor. Hill v. Lewis, 25 P. 589, 45 Kan. 162.

[12] Grisso v. Crump, 61 Okl. 83, 160 P. 453; Rev. Laws 1910, § 4696.

[13] Missouri, K. & T. Ry. Co. v. Lynn, 62 Okl. 17, 161 P. 1058.

[14] Constant v. Lehman, 34 P. 745, 52 Kan. 227.

Where, in an action to set aside a deed on the ground of fraud, such deed was executed by husband and wife, and where the former died before the action was brought, a child born subsequent to the delivery of the deed is a proper party to such action, and may be joined with the widow as plaintiff therein. Brown v. Brown, 64 P. 599, 62 Kan. 666.

A judgment in ejectment is not void as to defendants in actual possession because the holder of the legal title, not in possession, was not made a party.[15]

Where more than legal rate of interest has been paid on note by one of joint and several makers, party by whom it has been paid may recover on account of usury, without joining other makers.[16]

§ 405. Where parties numerous

"When the question is one of common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." [17]

For example, where property is claimed by a church organization not incorporated, and the property is in dispute, any number of the members of such association or congregation may maintain an action for the benefit of the church.[18]

§ 406. Style

"In a civil action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant." [19]

[15] Fulton v. Mathers, 90 P. 256, 75 Kan. 770.
[16] Security State Bank v. Chandler, 64 Okl. 10, 166 P. 162. See Rev. Laws 1910, § 1005, as to usury.
[17] Rev. Laws 1910, § 4693.
[18] Fink v. Umscheid, 19 P. 623, 40 Kan. 271, 2 L. R. A. 146.
[19] Rev. Laws 1910, § 4651.

ARTICLE II

PLAINTIFF

Sections

407. Real party in interest.
408. Joinder.
409. New party.
410. Capacity to sue.
411. Corporations.
412. In particular cases.
413. Creditors.
414. Stockholders' suit.
415. Insurance.
416. Taxpayers—Injunction.
417. Assignee and assignor.
418. Persons not personally interested.
419. Guardian.
420. Infants—Wards.
421. Tenants in common.
422. Government and governmental agencies.
423. Action for death.

§ 407. Real party in interest

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in this article; but this section shall not be deemed to authorize the assignment of a thing in action, not arising out of contract." [20]

The test of whether one is the real party in suit is: Does he satisfy the call for the person who has the right to control and receive the fruits of the litigation? [21]

[20] Rev. Laws 1910, § 4681.

Every action must be prosecuted in the name of the real party in interest. Maxia v. Oklahoma Portland Cement Co. (Okl.) 176 P. 907.

Under Code Civ. Proc. p. 767, c. 66, § 26, providing that every action must be prosecuted in the name of the real party in interest, if an action is prosecuted in the name of the government upon the relation of certain individuals, these individuals must be the real parties in interest. United States v. Choctaw, O. & G. R. Co., 41 P. 729, 3 Okl. 404. If the relief sought in an action brought in the name of the government on the relation of certain individuals is merely for the protection of private rights, the relators must show some special interest, and their rights must clearly appear, since they are regarded as the real parties. Id. If the United States is the real party in interest in a proceeding brought on the relation of certain individuals, such relators are improperly joined. Id. If the object of a proceeding is to compel the performance of a public duty or to restrain the commission of a public wrong, the people are the real parties in interest, and the action must be

[21] Stinchcomb v. Patteson (Okl.) 167 P. 619.

Plaintiff in ejectment is not the "real party in interest," entitled to bring action, unless he is a party who may be benefited or injured by the judgment.[22]

The assignee of a lease contract is the real party in interest in action of ejectment.[23]

Defendant has a right to insist that an action against him shall be brought by the real party in interest under the statute, but it is sufficient if defendant is not shut out from defenses and counterclaims, and is fully protected from any further liability.[24]

Where a widow brings suit in the name of her deceased husband, and the evidence discloses that since his death she has signed his name, instead of her own, in business transactions, and that she is known by that name as well as by her own, such suit is prosecuted in the name of the real party in interest, and the record sufficiently identifies her to bar a similar action between the same parties.[25]

§ 408. Joinder

All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this article.[26]

brought in the name of the territory upon the relation of some member of the public who shows a personal interest in the result. Id.

An informer cannot maintain an action for damages under the first provision of Comp. Laws 1909, § 7413, against a public officer for malfeasance in office, the right being given to innocent persons suffering special damage, as distinguished from those injured generally in common with others. McGuire v. Skelton, 129 P. 739, 36 Okl. 500.

Abstracters.—An abstracter's liability, under Wilson's Rev. & Ann. St. 1903, § 1, is not confined to the person for whom he makes an abstract. Sackett v. Rose, 55 Okl. 398, 154 P. 1177, L. R. A. 1916D, 820. A person injured by incompleteness or error in an abstract of title is entitled to all damages proximately resulting. Id.

Under Wilson's Rev. & Ann. St. 1903, § 1, an abstracter is liable on his bond for defects in an abstract not only to the person ordering same, but to any one relying on same to his injury. Scott v. Jordan, 55 Okl. 708, 155 P. 498. Under Wilson's Rev. & Ann. St. 1903, § 1, an abstracter vouches for the correctness of an abstract compiled and certified by him. Id.

[22] Miller v. Grayson, 64 Okl. 122, 166 P. 1077; Jackson v. McGilbray, 46 Okl. 208, 148 P. 703.

[23] McElroy v. Moose, 51 Okl. 173, 151 P. 857.

[24] Rullman v. Rullman, 106 P. 52, 81 Kan. 521.

[25] Deets v. Smith, 51 P. 581, 6 Kan. App. 601.

[26] Rev. Laws 1910, § 4690.

This does not mean that all interested must join. Bissey v. City of Marion, 104 Kan. 311, 178 P. 611.

Plaintiff and two others were appointed by a city as a committee to super-

All parties united in interest as parties plaintiff in the subject-matter of the litigation must be joined as plaintiff.[27]

Persons in whose favor an obligation exists must all join in an action thereon, unless the interest of each of the parties to be benefited is specially stated in the contract, or is determined by the character of the obligation.[28]

Where two parties have joint interest in property, they must join in an action for injuries thereto.[29]

Where two or more persons have a separate interest in property and sustain a separate damage thereto, they cannot join in the same action, though their several injuries were caused by the same act.[30]

intend the construction of waterworks for the city, plaintiff being appointed because of his knowledge and experience as a civil engineer. Any two of the committee were authorized to act. They all entered upon the discharge of their duties under the appointment, but did not all do the same amount of work. The work for which they were appointed was all performed and completed and was accepted by the city. Held, that plaintiff might thereafter maintain an action against the city for compensation for his individual services, without joining with him as plaintiffs the other members of the committee, under Civ. Code, § 35, providing that "all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs," and section 37, providing that "of the parties to the action those who are united in interest must be joined as plaintiffs or defendants." City of Ellsworth v. Rossiter, 26 P. 674, 46 Kan. 237.

Decedent, in consideration of a conveyance to him of land, verbally agreed to pay one-half of a mortgage on other land conveyed at the same time by his grantor to plaintiff, and thereafter verbally agreed with plaintiff to pay the same proportion of a mortgage given in renewal of said mortgage. On his dying seised of the land, without sufficient personalty to pay his share of the mortgage, and on his administrator's refusal to allow the claim based on said agreement against the estate, plaintiff sued the administrator, praying that the land be subjected to payment of the claim. Held, that there was no defect of parties plaintiff. McDowell v. Miller, 42 P. 402, 1 Kan. App. 666.

Where the sureties on a sheriff's bond have paid the judgment rendered against him for making an illegal levy, the sureties paying the same must all be joined as plaintiffs in an action to recover the money paid from the original attachment plaintiff, since "united in interest," within Code Civ. Proc. § 37. Burkett v. Lehman-Higginson Grocery Co., 56 P. 856, 8 Okl. 84. In all actions those between whom there is a unity of legal interest must be joined as plaintiffs. Id.

Evidence in an action to recover the price of corporate stock, which plaintiffs were fraudulently induced to buy, held to establish the right of plaintiffs to sue jointly, where it showed that the money paid for the stock came from a common fund. Ellsworth v. Trinkle, 153 P. 543, 96 Kan. 666.

[27] Stinchcomb v. Patteson (Okl.) 167 P. 619.

[28] Burkett v. Lehmen-Higginson Grocery Co., 56 P. 856, 8 Okl. 84.

[29] St. Louis & S. F. R. Co. v. Webb, 128 P. 252, 36 Okl. 235.

[30] St. Louis & S. F. R. Co. v. Dickerson, 118 P. 140, 29 Okl. 386.

Where plaintiffs had severally stored grain in an elevator, under an agreement to pay storage thereon, and that each might remove his grain whenever he saw fit, they could not properly join as plaintiffs in an action for conversion of the grain.[31]

An insurer may join with the insured as plaintiff to recover for the loss of property negligently destroyed by fire.[32]

Mortgagees under mortgages delivered and filed at the same time may join in an action for the conversion of the mortgaged property.[33]

A contract entered into and performed jointly by two or more persons, the compensation for the performance of which is separate and distinct as to each, may be sued upon separately by each to recover the amount due to him or the damages sustained by him.[34]

Joint action may be maintained on a guardian's bond on behalf of two wards for an accounting and settlement, where they have a joint interest in the fund or property.[35]

One who, though not the judgment plaintiff, is the real owner of the judgment and of the note on which it is based, may sue on the constable's bond for his failure to pay over the proceeds of the execution, without joining as plaintiff the judgment plaintiff.[36]

In action on note, payee may be joined as plaintiff with another who is beneficially interested.[37]

§ 409. New party

"When, in an action for the recovery of real or personal property, any person having an interest in the property applies to be made a party, the court may order it to be done." [38]

§ 410. Capacity to sue

The capacity to sue is the right to come into court, and differs from a cause of action, which is the right to relief in court.[39]

[31] Central State Bank of Geneseo v. Walker, 53 P. 379, 7 Kan. App. 748.
[32] Atchison, T. & S. F. R. Co. v. Neet, 54 P. 134, 7 Kan. App. 495.
[33] Hays v. Farwell, 35 P. 794, 53 Kan. 78.
[34] Curry v. Kansas & C. P. Ry. Co., 48 P. 579, 58 Kan. 6; Kansas & C. P. R. Co. v. Curry, 51 P. 576, 6 Kan. App. 561.
[35] Donnell v. Dansby, 159 P. 317, 58 Okl. 165.
[36] Dodge v. Kincaid Bros., 1 P. 107, 30 Kan. 346.
[37] Wade v. Hall, 64 Okl. 173, 166 P. 720.
[38] Rev. Laws 1910, § 4697.
[39] Howell v. Iola Portland Cement Co., 121 P. 346, 86 Kan. 450.

§ 411. —— Corporations

No foreign corporation transacting business in the state, which shall fail to comply with the provisions of Article 10, chap. 15, Rev. Laws 1910, "can maintain any suit or action, either legal or equitable, in any of the courts of this State, upon any demand, whether arising out of contract or tort." [40]

A foreign corporation engaged in interstate commerce may sue on a contract of employment entered into with a citizen of Oklahoma, though it has not filed a copy of its articles of incorporation, or appointed a service agent in the state, the appointment of an agent not constituting doing business in the state.[41]

Where a national bank is placed in voluntary liquidation in charge of liquidating agent, it is capable of suing and being sued in its corporate capacity, until its affairs are settled.[42]

§ 412. —— In particular cases

A principal may maintain in his own name an action upon a written contract made in the name of the agent.[43]

An agent, who purchases a note with his principal's money and has it indorsed to himself, may sue thereon in his own name.[44]

Where a building contractor's bond provided security for persons furnishing material or labor without regard to whether the claims were a lien on the building, one who furnished cement to be used in building could maintain a suit on the bond.[45]

A person suing to abate a nuisance must bring himself within the statute authorizing the suit.[46]

[40] Rev. Laws 1910, § 1341.

[41] Kibby v. Cubie, Heimann & Co., 137 P. 352, 41 Okl. 116.

A foreign corporation which had not complied with Rev. Laws 1910, §§ 1335, 1336, held not entitled to sue on any demand, whether arising out of contract or tort. Goodner Krumm Co. v. J. L. Owens Mfg. Co., 51 Okl. 376, 152 P. 86.

That plaintiff was a foreign corporation, and had not complied with the statute, by filing a copy of its charter, etc., held not to constitute a defense in an action on notes. Citizens' Life Ins. Co. v. Owen, 139 P. 516, 40 Okl. 446.

[42] Oklahoma City Nat. Bank v. Ezzard, 58 Okl. 251, 159 P. 267, L. R. A. 1918A, 411.

[43] Choate v. Stander, 61 Okl. 148, 160 P. 737; Schmucker v. Higgins-Roberts Grain Co., 116 P. 184, 28 Okl. 721.

[44] Routh v. Kostachek, 81 P. 429, 15 Okl. 234.

[45] Crudup v. Oklahoma Portland Cement Co., 56 Okl. 786, 156 P. 899.

[46] Wilson's Rev. & Ann. St. 1903, c. 13, art. 10, § 134, provides that it shall be unlawful to maintain a slaughterhouse within certain distances of lands platted into lots for residence purposes. Section 136 provides that the maintaining of any slaughterhouse in violation of the act shall be a nuisance,

A public nuisance may be abated by a civil action brought by the state on the relation of the county attorney of the county in which such nuisance exists.[47]

The grantor in a deed void as against defendants in adverse possession may maintain an action in his own name against those holding adversely and his grantees to cancel void deeds to those in adverse possession.[48]

One who owns an equitable title to real property and is in possession may maintain an action for permanent injuries thereto.[49]

and that any person owning real estate within the lands platted and set apart for residences may sue to abate such nuisance, and that sheriffs, constables, or other police officers may make complaint to abate the same. Held, that section 136 limits the persons authorized to sue to the owners of real estate as described therein, and one who is not such owner or officer must bring himself within the provisions of Wilson's Rev. & Ann. St. 1903, c. 56, entitled "Nuisance." Weaver v. Kuchler, 87 P. 600, 17 Okl. 189.

Comp. Laws 1909, § 966 (Wilson's Rev. & Ann. St. 1903, § 625), makes it unlawful to establish and use land for burial purposes which is less than three-quarters of a mile from land platted as an addition to a city or town, wherein lots have been sold in good faith before the cemetery was located, or within such distance of land platted into blocks for sale for resident purposes, wherein lots have been sold in good faith before the cemetery was located. Section 967 (626) makes such maintenance and use of a cemetery a nuisance, and provides that any person owning real estate within any such addition to a town or city or within the land platted to be sold for resident purposes may sue to abate such nuisance and enjoin its continuance. Held, that the last section limits the persons authorized to sue to owners of lands described therein, and another person seeking relief by way of abatement of the nuisance must bring himself within Comp. Laws 1909, §§ 4751–4769 (Wilson's Rev. & Ann. St. 1903, §§ 3717–3735), relating to nuisances. Clinton Cemetery Ass'n v. McAttee, 111 P. 392, 27 Okl. 160, 31 L. R. A. (N. S.) 945.

Under Comp Laws 1909, §§ 966, 967, making it unlawful for any person to maintain a cemetery located less than three-fourths of a mile from any platted land to be sold for residences, where lots may have been sold in good faith before the cemetery was located, and the facts show that plaintiff had purchased in good faith lots lying within such platted lands, he is entitled to a perpetual injunction against parties maintaining such cemetery. Furstenburg v. Brissey, 115 P. 465, 28 Okl. 591.

[47] Balch v. State (Okl.) 164 P. 776.

An action may be maintained in the name of the territory under the direct provisions of Wilson's St. 1903, § 4440, to enjoin and suppress the keeping and maintenance of a common nuisance. Reaves v. Territory, 74 P. 951, 13 Okl. 396.

[48] Burckhalter v. Vann, 59 Okl. 114, 157 P. 1148.

[49] Foster Lumber Co. v. Arkansas Valley & W. Ry. Co., 95 P. 224, 20 Okl. 583, 30 L. R. A. (N. S.) 231, judgment affirmed on rehearing 100 P. 1110, 20 Okl. 583, 30 L. R. A. (N. S.) 231.

§ 413. —— Creditors

The presumption of invalidity of a transfer of merchandise in bulk may be taken advantage of by a creditor of the transferrer, though his debt existed before the transferrer acquired the stock, and though none of the consideration for the debt went into the stock.[50]

A voluntary conveyance is good as against a subsequent creditor when not made with fraudulent intent to incur the debt, and where the creditor has not extended credit on faith of the grantor's ownership of the particular property conveyed.[51]

A subsequent creditor, who extends credit after actual or constructive notice of a fraudulent conveyance, cannot attack same.[52]

A person having a claim growing out of a tort independent of contract is a "creditor," so as to entitle him to have canceled and set aside a conveyance of real estate made to defraud creditors.[53]

A direct action cannot be maintained against the purchaser by a creditor of one who has sold his entire stock of goods without complying with the bulk sales law.[54]

To enable a creditor to assail the validity of a chattel mortgage executed by his debtor, he must not only obtain a judgment, but also a valid execution against the property of the debtor.[55]

Where a mortgagee of chattels to enforce its lien seizes the mortgaged chattels in the hands of a third person, claiming to be the owner, and such third person sues to recover their value, and the mortgagee defends on the ground that the mortgagor made a fraudulent transfer to such third party and executed the mortgage, but there was no change of possession, such mortgagee will be treated as an incumbrancer, and not as a creditor of the mortgagor, and must show that it became an incumbrancer in good faith subsequent to the fraudulent transfer.[56]

[50] Galbraith v. Oklahoma State Bank, 130 P. 541, 36 Okl. 807.
[51] Van Arsdale v. Findley, 132 P. 135, 37 Okl. 425.
[52] Rauh v. Morris, 137 P. 1174, 40 Okl. 288.
[53] Shelby v. Ziegler, 98 P. 989, 22 Okl. 799.
[54] Rogers' Milling Co. v. Goff, Gamble & Wright Co., 46 Okl. 339, 148 P. 1029.
[55] Chandler v. Colcord, 32 P. 330, 1 Okl. 260.
[56] First Nat. Bank v. Yeoman, 78 P. 388, 14 Okl. 626.

§ 414. —— Stockholders' suit

In an action by corporation upon a claim where a stockholder had no interest in the subject-matter of the suit, the corporation was the only proper party plaintiff.[57]

Where a corporation has ceased to do business and stock is owned exclusively by two, and the majority stockholder in charge of its property and affairs has converted all assets to his own use, the minority stockholder can maintain suit against him, where corporation is made a party defendant, and obtain a judgment against majority stockholder for aliquot part of funds due corporation.[58]

Where corporate stock is held by assignment and delivery as security for a debt, and the assignor, being the president of the corporation procures a reissue of such stock to himself and assigns the reissued stock to a third person, and by the vote of such stock the corporation is reorganized under a different name, and the property and franchise rights are sought to be invested into such reorganized company, the bona fide holder of such stock is not required to reduce his demand against his assignor to judgment before he may lawfully sue to have the original company reinvested with its corporate and franchise rights.[59]

§ 415. —— Insurance

Under a "standard" mortgage clause in a fire policy providing that insurance shall not be invalidated as to the mortgagee by any act or neglect of the mortgagor, the mortgagee may maintain a suit in his own name, and the cause of action cannot be defeated by any act or neglect of the mortgagor.[60]

Where the mortgage debt was less than the amount due on the

[57] Burke Grain Co. v. Stinchcomb (Okl.) 173 P. 204.

[58] Dill v. Johnston (Okl.) 179 P. 608. In suit by the minority stockholder against the majority stockholder where corporation has permitted majority stockholder to convert all its property to his own use, court may enter judgment directly in favor of minority stockholder for his aliquot part, without appointing a receiver or rendering judgment for corporation against majority stockholder. Id. In suit by the minority stockholder for a division of corporation's assets after their conversion by the majority stockholder to his own use and after corporation had ceased to do business, evidence held sufficient to sustain the findings of the referee and judgment of court thereon in favor of the minority stockholder. Id.

[59] First Nat. Bank v. Stribling, 86 P. 512, 16 Okl. 41.

[60] Fidelity-Phenix Fire Ins. Co. v. Cleveland, 57 Okl. 237, 156 P. 638.

insurance policy, the insured could sue on the policy in her own name though a mortgage clause was attached to the policy.[61]

Where the insured conveyed property covered by the policy by a contract making the loss payable to the insured as its interest might appear, and the property was destroyed before the policy was assigned, the purchaser was not the owner with the right of action thereon.[62]

§ 416. Taxpayers—Injunction

An injunction will not lie at the suit of a private citizen to protect public interests.[63]

The right to maintain a taxpayer's suit is determined by statute in many cases.[64]

Where the bridge over a creek crossed by a city street is allowed to remain in a condition not open for traffic, the owner of a tract on one side of the street and both sides of the creek sustains a special injury, and may maintain an action for mandatory injunction against those responsible for the condition, though such action cannot be maintained by one owning a tract on a cross street opposite the termination of a street.[65]

A taxpayer has no such interest in a suit to enjoin the holding of an election to recall a mayor as will entitle him to prosecute such suit.[66]

[61] Liverpool & London & Globe Ins. Co. v. Cargill, 44 Okl. 735, 145 P. 1134.

[62] Springfield Fire & Marine Ins. Co. v. E. B. Cockrell Holding Co. (Okl.) 169 P. 1060.

[63] Ruthstrom v. Peterson, 83 P. 825, 72 Kan. 679.

[64] An action may be maintained on relation of resident taxpayers against city officers who have allowed and paid claim pursuant to an unlawful or fraudulent contract, and against the person to whom the money is paid, to recover double such amount. State v. Oklahoma City (Okl.) 168 P. 227.

Where city after written demand of ten resident taxpayers neglects to sue to recover money unlawfully paid by its officers to railroad, any resident taxpayer may sue in the name of the state for the penalty; one-half of recovery going to plaintiff as a reward, and remainder to city. State v. City of Muskogee (Okl.) 172 P. 796. When city neglects to sue for money unlawfully paid out by city officials after written demand by resident taxpayers, a taxpayer who sues to recover penalty under Rev. Laws 1910, §§ 6777, 6778, has interest in cause of action not affected by city's subsequent suit. Id. Sureties on official bonds of city officials sued by resident taxpayers to recover penalty prescribed by Rev. Laws 1910, §§ 6777, 6778, for misappropriation of moneys not being liable for such penalty, are not proper parties therein. Id.

[65] Bissey v. City of Marion, 104 Kan. 311, 178 P. 611.

[66] City Council of City of McAlester v. Milwee, 122 P. 173, 31 Okl. 620, 40 L. R. A. (N. S.) 576.

In the absence of any statute so authorizing, a county attorney cannot sue in his official name to enjoin issuance of warrants for construction of bridges under a void contract.[67]

A petition to enjoin the action of the state engineer and an applicant for water rights is not subject to the charge of misjoinder of parties because there are joined therein all the parties claiming a right to the water along with the state engineer, and the relief asked against him is different from that asked against his codefendant.[68]

A final injunction will not be granted, in the absence of a necessary and indispensable party to the action; and, until all those whose legal rights are to be directly affected by a permanent injunction are made parties to the action, a perpetual injunction is rightly refused.[69]

Where the record shows that defendants are only nominal parties, and that the real parties in interest have not been brought into court, and the relief sought would bar the absent parties from their day in court, the injunction should be denied, although the defendants before the court do not raise the question of a defect of parties, either by demurrer or answer.[70]

[67] Dolezal v. Postick, 139 P. 964, 41 Okl. 743. Under St. 1893, §§ 1646, 1648, 1649, the territory of Oklahoma had sufficient interest to enable it to enjoin county officers from unlawfully expending county money. Id. A county officer, prior to statehood, was authorized to sue in the name of the territory to enjoin the county clerk from issuing warrants for the misapplication of county funds. Id.

[68] Gay v. Hicks, 124 P. 1077, 33 Okl. 675; Same v. Wallace, 124 P. 1082, 33 Okl. 687.

[69] Jeffries-Ba Som v. Nation, 65 P. 226, 63 Kan. 247.

In an action to perpetually enjoin a city and its officers and certain county officers from levying or collecting any taxes to pay interest on certain city bonds, and to have the bonds declared null and void, the bondholders are necessary parties, and the action cannot be maintained without making them parties. City of Anthony v. State, 30 P. 488, 49 Kan. 246.

The board of railroad commissioners, under Laws 1887, c. 184, granted a railroad company the right to cross the roads of two other companies, and fixed the manner of crossing, and the compensation to be paid by the crossing company. From this order no appeal was taken. Four months later, and before the crossing was made, the companies over whose roads the crossing was allowed applied to the board of railroad commissioners for a rehearing, and to set aside the order allowing the crossing. Held, on application by the crossing company for an injunction to restrain the board from granting such rehearing, that the railroad companies which applied for the rehearing were necessary parties. Union Terminal R. Co. v. Board of Railroad Com'rs., 35 P. 224, 52 Kan. 680.

[70] Walker v. Cambern, 47 P. 980, 5 Kan. App. 545.

§ 417. Assignee and assignor

"In the case of an assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defense now allowed; but this section shall not apply to negotiable bonds, promissory notes or bills of exchange, transferred in good faith and upon good consideration, before due." [71]

One to whom a contract right has been transferred may maintain an action thereon, though he has no beneficial interest therein.[72]

The assignee of an account may maintain action thereon, although the assignor is the party beneficially interested,[73] and it is immaterial to the debtor whether the account was given or sold to the assignee.[74]

Where a written contract of sale of land was assigned as collateral security for faithful performance of a building contract by the assignor, the assignee could sue the original vendor for breach of the contract of sale, without making the assignor a party.[75]

One to whom a claim for injuries to freight is assigned is entitled to maintain an action thereon; the assignor not being a necessary party.[76]

Where the assignee of a final foreign judgment which definitely fixed the liability of defendants under an indemnity bond released the judgment in consideration of the judgment debtors assigning the bond to him, the assignee, being absolute owner of the bond, could sue thereon.[77]

The assignee of the payee of a note is entitled to sue thereon, though the payee was designated as guardian in the face of the note.[78]

Where a note in aid of railroad construction was delivered to a construction company and the railroad was duly completed and the receiver of the construction company assigned the note to the receiver of the railway company, and the assets of the railway were sold to a third party, who delivered the note to the plaintiff railroad, plaintiff could maintain an action thereon.[79]

[71] Rev. Laws 1910, § 4682.
[72] Rullman v. Rullman, 106 P. 52, 81 Kan. 521.
[73] Hull v. Massachusetts Bonding & Ins. Co., 120 P. 544, 86 Kan. 342.
[74] Krapp v. Eldridge, 5 P. 372, 33 Kan. 106.
[75] Marker v. Gillam, 54 Okl. 766, 154 P. 351.
[76] Chicago, R. I. & P. Ry. Co. v. Bankers' Nat. Bank, 122 P. 499, 32 Okl. 290.
[77] McFarlan v Adair, 46 Okl. 46, 148 P. 138.
[78] Bank of Welch v. Cabell, 52 Okl. 190, 152 P. 844.
[79] Purcell Mill & Elevator Co. v. Canadian Valley Const. Co., 58 Okl. 629, 160 P. 485.

A claim for money found to be due by the verdict of the jury in an action for the conversion of personalty may be assigned to a third person, so as to give the assignee the right to recover the same.[80]

§ 418. Persons not personally interested

"An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way." [81]

A trustee of personal property for sale and to apply proceeds to payment of debts can maintain an action for the conversion of the property.[82]

An action on a note is properly brought by the party holding the legal title to same, though there are other parties beneficially interested in the note.[83]

Where, in an action on a note by an assignee against the maker, a third party intervenes, charging fraud of creditors and seeking to recover money alleged to be theirs, such creditors are necessary parties to the proceedings.[84]

An action may be maintained on a contract for the benefit of a third party by the person in whose name the contract was made.[85]

The assignee of a judgment, in whom is vested the legal title, and who is authorized to receive the amount of it, may sue on the supersedeas bond given upon an appeal from such judgment, without joining those to whom, by collateral agreement between him and his assignor, the proceeds of the judgment are to be paid.[86]

§ 419. —— Guardian

The guardian of an insane woman cannot bring an action against her husband for divorce or for alimony.[87]

[80] Noble v. Hunter, 43 P. 994, 2 Kan. App. 538.
[81] Rev. Laws 1910, § 4683.
[82] First Nat. Bank v. Hinkle (Okl.) 162 P. 1092.
[83] Chaffee v. Shartel, 46 Okl. 199, 148 P. 686.
[84] Goodrich v. Williamson, 63 P. 974, 10 Okl. 588, 617.
[85] Shellberg v. McMahon, 157 P. 268, 98 Kan. 46.
[86] Walburn v. Chenault, 23 P. 657, 43 Kan. 352.
[87] Birdzell v. Birdzell, 6 P. 561, 33 Kan. 433, 52 Am. Rep. 539, rehearing denied 11 P. 907, 35 Kan. 638.

The duly appointed acting guardian of minors may in her own name maintain an action for property of her wards without joining them as parties.[88]

§ 420. Infants—Wards

"The action of an infant must be brought by his guardian or next friend. When the action is brought by his next friend, the court has power to dismiss it, if it is not for the benefit of the infant, or substitute the guardian of the infant, or any person as the next friend." [89]

Where the guardian of an infant is removed for failure to account, and no successor is appointed, an action on the bond for the benefit of the infant may be brought by the next friend.[90]

A minor may sue by his legal guardian on the official bond of a former guardian, though the bond executed prior to statehood was made payable to the United States.[91]

Where guardian dies without settlement in the county court, the former wards may maintain an action in the superior or district court against his personal representatives and sureties on his bond as guardian for such accounting and settlement.[92]

§ 421. Tenants in common

One tenant in common may sue to recover realty from a third person; but his recovery is limited to such interest as he proves title in himself superior to that of defendants.[93]

[88] Kerr v. McKinney (Okl.) 170 P. 685.

[89] Rev. Laws 1910, § 4686.

[90] First State Bank of Vinita v. Fay, 60 Okl. 132, 159 P. 505; Hill v. Reed, 103 P. 855, 23 Okl. 616.

A minor may by his legal guardian sue on a former guardian's official bond. Lyons v. Fulsom, 54 Okl. 84, 153 P. 868.

Where guardian dies without accounting and settlement, his former wards may maintain action against his personal representatives and sureties on his bond for such accounting and settlement. Donnell v. Dansby, 58 Okl. 165, 159 P. 317. Where father who had been appointed guardian made no charge for expenditures in behalf of minors, and obtained no authority from county court therefor, no credits can be allowed after his death in action against sureties on his bond. Id.

[91] Title Guaranty & Surety Co. v. Slinker, 128 P. 696, 35 Okl. 128; Id., 128 P. 698, 35 Okl. 153.

[92] Title Guaranty & Surety Co. of Scranton, Pa., v. Burton (Okl.) 170 P. 1170; Asher v. Stull, 61 Okl. 320, 161 P. 808.

[93] Moppin v. Norton, 137 P. 1182, 40 Okl. 284, Ann. Cas. 1915D, 1042.

A joint tenant of land, can maintain ejectment against his cotenant, who has ousted him or denied his interest in such land.[94]

§ 422. Government and governmental agencies

The United States may sue to cancel a patent for fraud, where the government is the only part interested, where the land is not subject to patent, but is erroneously patented, and where the land, though subject to patent, is patented to the wrong person, either through fraud, mistake, or inadvertence.[95]

The United States, as plaintiff, has no superior rights, but is controlled by the same principles of law and rules of practice as a citizen.[96]

The right of county to sue and be sued is purely statutory, and the mode prescribed by statute for prosecuting actions must be strictly followed.[97]

Where the public are interested, and it is necessary to bring the action in the name of the state, such action can only be brought at the instance of the public officer authorized by statute.[98]

An action cannot be commenced against a delinquent officer, except on order of the county commissioners, and the county attorney cannot appeal from a judgment against the county in such case without the consent and against the wishes of the commissioners.[99]

§ 423. Action for death

The statutes giving an action for wrongful death, contemplate but one action, and the same death cannot be sued for in separate actions by the various individuals sustaining damages thereby.[1]

If death results from personal injuries, an action cannot be main-

[94] Jameson v. Goodwin (Okl.) 170 P. 241.

[95] Lynch v. United States, 73 P. 1095, 13 Okl. 142.

[96] Lynch v. United States, 73 P. 1095, 13 Okl. 142.

[97] Smith v. State, 13 Okl. Cr. R. 619, 166 P. 463; Muskogee County v. Lanning & McRoberts, 51 Okl. 343, 151 P. 1054; Showers v. Caddo County, 77 P. 189, 14 Okl. 157.

[98] Territory v. De Wolfe, 74 P. 98, 13 Okl. 454, writ of error dismissed 25 S. Ct. 794, 196 U. S. 643, 49 L. Ed. 632. The bare allegation in a petition that territorial officers have refused to bring the action is not sufficient to authorize the use of the name of the territory by a private individual. Id.

[99] Kingfisher County v. Graham, 139 P. 1149, 40 Okl. 571; Same v. Downing, 139 P. 1153, 40 Okl. 580; Same v. Miles, 139 P. 1153, 40 Okl. 581; Same v. Woodworth, 139 P. 1153, 40 Okl. 581; Same v. Bowman, 139 P. 1153, 40 Okl. 582; Same v. Lindsey, 140 P. 434, 40 Okl. 607.

[1] Cowan v. Atchison, T. & S. F. Ry. Co., 168 P. 1015, L. R. A. 1918B, 1141.

tained by the personal representative of the deceased for the benefit of the estate, but may be brought for the benefit of the next of kin.[2]

An action for wrongful death can be brought only by the parties designated in the statute.[3] The statute contemplates but one action, and the same death cannot be sued for in separate actions by the various individuals sustaining damage thereby.[4]

The words "next of kin" as used in the statute relating to wrongful death mean those who inherit from the deceased under the statutes of descent and distribution.[5]

[2] Martin v. Missouri Pac. Ry. Co., 49 P. 605, 58 Kan. 475.

[3] Shawnee Gas & Electric Co. v. Motesenbocker, 138 P. 790, 41 Okl. 454.

[4] Shawnee Gas & Electric Co. v. Motesenbocker, 138 P. 790, 41 Okl. 454.

[5] Bolinger v. Beacham, 106 P. 1094, 81 Kan. 746; Shawnee Gas & Electric Co. v. Motesenbocker, 138 P. 790, 41 Okl. 454; Atchison, T. & S. F. Ry. Co. v. Ryan, 64 P. 603, 62 Kan. 682.

Where estate of deceased adult, leaving a father and sister surviving, was not administered on, father is "next of kin," within Rev. Laws 1910, § 8418, and may maintain an action for his wrongful death, where deceased contributed to his support. Whitehead Coal Mining Co. v. Pinkston (Okl.) 175 P. 364.

Where a person for whose death action is brought left neither widow nor children nor father surviving him, but left a mother and brothers and sisters, the mother, brothers and sisters are "next of kin" within the meaning of the statute making the "next of kin" necessary parties to the action. Motsenbocker v. Shawnee Gas & Electric Co., 49 Okl. 304, 152 P. 82, L. R. A. 1916B, 910.

Where a minor leaves no issue, or wife, but leaves both father and mother, they are his only heirs and next of kin, who sue for his death under Rev. Laws 1910, §§ 5281, 5282. Cowan v. Atchison, T. & S. F. Ry. Co., 168 P. 1015, L. R. A. 1918B, 1141.

The surviving husband is, within Civ. Code, § 422, next of kin to his wife and entitled to recover damages for her wrongful death. Atchison, T. & S. F. Ry. Co. v. Townsend, 81 P. 205, 71 Kan. 524, 6 Ann. Cas. 191.

Under Code Civ. Proc. § 422, nonresident alien parents, next of kin of a minor son whose death was wrongfully caused by the negligence of another, may maintain an action to recover for his death. Atchison, T. & S. F. Ry. Co. v. Fajardo, 86 P. 301, 74 Kan. 314, 6 L. R. A. (N. S.) 681.

Where a deceased child leaves no issue, husband, or wife, but leaves father and mother, brothers and sisters of deceased should not be joined with the father and mother in an action for wrongful death. Kali Inla Coal Co. v. Ghinelli, 55 Okl. 289, 155 P. 606.

Where no personal representative is appointed, and the deceased left no widow, all the next of kin must join in the action. Shawnee Gas & Electric Co. v. Motesenbocker, 138 P. 790, 41 Okl. 454. Where the person for whose death suit is brought left neither widow nor children nor father surviving him, but left a mother and brothers and sisters, the brothers and sisters are

No recovery can be had by a parent for the death of a child except in virtue of the statute.[6]

A parent, to recover as next of kin for wrongful death of a minor child, a resident of the state, must prove that no personal representative has been appointed.[7]

An action for the wrongful death of a spouse may be maintained by the surviving spouse for the benefit of herself or himself and minor children, where there has been no administration of decedent's estate.[8]

The right of recovery extends to all children of deceased, regardless of their ages; but the recovery must be based on the reasonable expectancy of pecuniary benefit of which they were de-

"next of kin" within the meaning of the statute, and must be joined in the action, though the mother alone has sustained any loss. Id.

[6] Siegrist v. Atchison, T. & S. F. Ry. Co., 137 P. 975, 91 Kan. 260.

[7] Atchison, T. & S. F. Ry. Co. v. Judah, 62 P. 711, 10 Kan. App. 577.

[8] Big Jack Mining Co. v. Parkinson, 137 P. 678, 41 Okl. 125.

Where no personal representative has been appointed, an action for wrongful death may be maintained by the widow. Mott v. Long, 132 P. 998, 90 Kan. 110.

Nonappointment of a personal representative of decedent is a condition precedent to the right of the widow to bring an action for wrongful death. Chicago R. I. & P. Ry. Co. v. Brooks, 57 Okl. 163, 156 P. 362.

An action on a cause arising in state for death of plaintiff's husband resident in the state, from defendant's wrongful act or negligence of another, where no personal representative had been appointed, was properly brought by widow in her own name. Blunt v. Chicago, R. I. & P. R. Co. (Okl.) 173 P. 656.

Under Comp. Laws 1909, §§ 5945, 5946, held that, where the petition in an action for death, failed to state that plaintiff's husband at the time of his death was a nonresident or was a resident, and that no personal representative had been appointed, it was demurrable. Frederick Cotton Oil & Mfg. Co. v. Clay, 50 Okl. 123, 150 P. 451.

A special administrator, appointed in another state where the deceased left property, held not entitled to sue to recover for the next of kin damages for the death of deceased whose residence and death were in the state. Metrakos v. Kansas City, M. & O. Ry. Co., 137 P. 953, 91 Kan. 342. An administrator appointed in another state may sue to recover for the death in Kansas of a resident of such other state. Id. An administrator appointed in another state cannot proceed under Code Civ. Proc. § 419 (Gen. St. 1909, § 6014), authorizing recovery for wrongful death where the law of his state prohibits him from maintaining an action there. Id. The widow of a nonresident whose death occurred in Kansas may recover as such widow under Code Civ. Proc. § 419 (Gen. St. 1909, § 6014), authorizing recovery for wrongful death, though not entitled to recover as administratrix. Id. Alien parents may recover under Code Civ. Proc. § 419 (Gen. St. 1909, § 6014), authorizing recovery for wrongful death, for the death in Kansas of a minor son. Id.

prived by their father's death.[9] A child born after its father's death is a beneficiary, and entitled to damages for wrongfully causing the death of the father.[10]

An ancillary administrator in a foreign state may sue there for the death in this state of his intestate, who resided in a third state, where a domiciliary administrator had been appointed, but could not sue under the state laws.[11]

Heirs of an Italian citizen were not prohibited by the treaty with Italy from suing for his wrongful death in the United States.[12]

The widow of a deceased railway employé cannot bring in her own name the action for damages, given by Act Cong. April 22, 1908 (U. S. Comp. St. § 8657), conferring the right of action on the "personal representative, for the benefit of the surviving widow or husband and children of such employé." [13]

Since the right of action for death is based entirely on statute, the action can be brought only in the name of the person to whom the right is given by statute.[14]

ARTICLE III

DEFENDANT

Sections

424. Necessary and proper parties defendant.
425. Receiver.
426. Liens.
427. Joinder.
428. Defendants severally liable.
429. Infants.
430. Guardian ad litem.
431. Husband and wife.
432. State as defendant.
433. Change of parties and new parties.
434. Substitution—Plaintiff.
435. Disclaimer.
436. Substitution of judgment creditor.

§ 424. Necessary and proper parties defendant

In ejectment involving only the right of possession, the person in actual occupancy is always a necessary party defendant.[15]

[9] Pressley v. Incorporated Town of Sallisaw, 54 Okl. 747, 154 P. 660.
[10] Herndon v. St. Louis & S. F. R. Co., 128 P. 727, 37 Okl. 256.
[11] Robinson v. Chicago, R. I. & P. Ry. Co., 150 P. 636, 96 Kan. 137.
[12] Kali Inla Coal Co. v. Ghinelli, 55 Okl. 289, 155 P. 606.
[13] Missouri, K. & T. Ry. Co. v. Lenahan, 39 Okl. 283, 135 P. 383.
[14] Id.
[15] Mullen v. Carter (Okl.) 173 P. 512.

Persons not in possession, when claiming possessory rights, are proper, but not necessary parties defendant.[16]

Where defendant sets up a deed to a third person before plaintiff obtained title as a defense, the fact that plaintiff introduces evidence that the deed was made to defraud does not render such third person a necessary party.[17]

In an action brought for the specific performance of a written contract to convey real estate, one to whom the vendor sold and conveyed the legal title, before the commencement of the action, is a necessary party.[18]

One having a written contract for the purchase of real estate with a person having a similar contract from the owner may bring an action for specific performance against both parties.[19]

Specific performance may be compelled by the purchaser in a recorded contract for the sale of land against one purchasing of his vendor after the contract was recorded, without making the vendor a party.[20]

In an action for divorce on the ground of cruelty, where it is alleged that property has been fraudulently conveyed to a third person to defeat the collection of any alimony, and defendant and the party to whom the conveyance was made are both served, the grantee is not a proper party to a divorce proceeding, and it is not error to refuse to permit him to be heard on the question of divorce, but his defense extends only to the question of alimony and the validity of the conveyance.[21]

Where an Indian allottee, after mortgaging his allotment, conveyed same by warranty deed, he was not a necessary party to proceedings to foreclose the mortgage, when no personal judgment was prayed against him.[22]

In a suit to cancel a patent, every person having an interest in the land included in the patent is an indispensable party.[23]

[16] Mullen v. Carter (Okl.) 173 P. 512.
[17] Rauer v. Thomas, 55 P. 285, 60 Kan. 71.
[18] Atchison, T. & S. F. R. Co. v. Benton, 22 P. 698, 42 Kan. 698.
[19] Welch v. McIntosh, 130 P. 641, 89 Kan. 47.
[20] Topeka Water Supply Co. v. Root, 42 P. 715, 56 Kan. 187.
[21] Bennett v. Bennett, 81 P. 632, 15 Okl. 286, 70 L. R. A. 864.
[22] Freeman v. First Nat. Bank of Boynton, 44 Okl. 146, 143 P. 1165, Ann. Cas. 1918A, 259.
[23] Lynch v. United States, 73 P. 1095, 13 Okl. 142.

In action to rescind a contract for the purchase of land and to recover advanced payment for failure of defendant to convey title, the only necessary defendant is the party against whom decree will operate.[24]

In an action to enjoin collection of special assessments, officers charged with their collection are the proper parties defendants, and holders of certificates or bonds for payment of which assessments are levied are not necessary parties.[25]

In a will contest, the refusal of the court to issue a citation for service on legatees and devisees residing without the state did not deprive the court of jurisdiction to proceed with the trial as to contestant and such defendants as had been served with citation.[26]

The board of county commissioners is not a necessary party to an action against the county treasurer or sheriff, or both, to enjoin the collection of an illegal tax or assessment.[27]

§ 425. —— Receiver

Where a receiver has been appointed for a lessee who has previously entered into a contract with the lessor, the receiver is not a necessary or proper party to an action by the lessor against the lessee for a violation of the contract.[28]

Where a receiver is appointed in the federal court for an interstate railroad, he may be made party defendant to an action in the state court to demolish a bridge belonging to such road and is bound by the judgment of the state court.[29]

§ 426. —— Liens

The original contractor is a necessary defendant to an action by a subcontractor to enforce a materialman's lien; but, if the return shows that service cannot be had on the original contractor, the subcontractor's lien may be enforced without obtaining a personal judgment against the original contractor.[30]

[24] Groves v. Stouder, 58 Okl. 744, 161 P. 239.

[25] City of Muskogee v. Nicholson (Okl.) 171 P. 1102.

[26] In re Land's Estate, 137 P. 246, 166 Cal. 538.

[27] Rogers v. Bass & Harbour Co., 47 Okl. 786, 150 P. 706.

[28] St. Louis & S. F. R. Co. v. Ravia Granite Ballast Co. (Okl.) 174 P. 252.

[29] Kaw Valley Drainage Dist. of Wyandotte County v. Missouri Pac. Ry. Co., 161 P. 937, 99 Kan. 188.

[30] New Home Lumber Co. v. Ryal, 56 Okl. 746, 156 P. 637.

The original contractor is an indispensable party to an action by a sub-

Where a contractor for the erection of a building lets a subcontract for a portion thereof, and the subcontractor permits liens to be filed against the building, the contractor is not required to defend against the respective amounts of such liens, but it is the duty of the subcontractor and those claiming liens under him to defend against the allowance by the court of excessive or unjust claims.[31]

A contractor for the erection of a building who lets a subcontract for a portion thereof may refuse to pay to any lien claimant under the subcontractor the amount of his lien until after he establishes the correctness thereof in court, and before an adjudication as to its correctness the contractor pays the same at his peril.[32]

Where a mortgagee fails to make the mechanic's lien holder party to foreclosure proceeding, a subcontractor, who has intervened within one year from the time he filed his lien statement, may make the contractors parties, after the expiration of one year, for the purpose of asserting and foreclosing his lien against the mortgagee and other incumbrancers.[33]

In the absence of exceptional facts alleged in the petition, the only proper parties defendant in foreclosure are the mortgagor and persons claiming an inferior interest.[34]

Where on foreclosure a grantee of the mortgagor appears and alleges an interest in the property, and a sale of one-half of such interest to a grantee named, such persons and their grantees are proper and necessary parties to the full determination of the action.[35]

A grantee in possession of the mortgaged premises is a necessary party on foreclosure, where the petition alleges that the mortgagors have conveyed to such grantee.[36]

A junior incumbrancer is not a necessary party to a suit by a

contractor or materialman to foreclose a lien against the owner's property. Eberle v. Drennan, 136 P. 162, 40 Okl. 59, 51 L. R. A. (N. S.) 68.

In a suit on account by a subcontractor for materials furnished, the contractor, with all the lienholders, are indispensable parties. Union Bond & Investment Co. v. Bernstein, 139 P. 974, 40 Okl. 527.

[31] Vandenberg v. P. T. Walton Lumber Co., 92 P. 149, 19 Okl. 169.

[32] Id.

[33] Blanshard v. Schwartz, 54 P. 303, 7 Okl. 23.

[34] De Watteville v. Sims, 44 Okl. 708, 146 P. 224.

[35] Gillett v. Romig, 87 P. 325, 17 Okl. 324.

[36] Page v. Turk, 143 P. 1047, 43 Okl. 667.

senior mortgagee to foreclose in such a sense that his presence on the record is necessary to a valid decree.[37]

In a suit to foreclose a mortgage, the heir of an intestate is not a necessary party, and is precluded by a decree of sale against the administrator.[38]

Where no administrator of the estate of a deceased mortgagor was appointed, and a suit to foreclose was brought against all the heirs, and no judgment was rendered against the estate of the mortgagor, the decree of foreclosure was valid.[39]

§ 427. Joinder

"Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." [40]

In actions of equitable cognizance, the general rule is that all parties materially interested, either legally or beneficially, in subject-matter of suit must be made parties either as plaintiffs or defendants, so that a complete decree may be made binding upon all parties.[41]

In a petition to enjoin a foreclosure sale under a mortgage on the ground of the mortgagee's breach of a contract to make releases to purchasers from the mortgagor, joinder of the sheriff ordered to make the sale and of purchaser from the mortgagor was not a misjoinder of parties.[42]

In an action by the administrator of a deceased trustee to recover the trust fund, which was wrongfully mingled by the trustee with his own property, it is not necessary to make all persons who may be interested in the estate parties.[43]

In an action by the equitable owner of real estate to recover the legal title and for an accounting against a mortgage company,

[37] McCredie v. Dubuque Fire & Marine Ins. Co., 63 Okl. 184, 163 P. 535.
[38] McClung v. Cullison, 82 P. 499, 15 Okl. 402.
[39] Brocker v. Stallard, 126 P. 781, 34 Okl. 612.
[40] Rev. Laws 1910, § 4691; Haynes v. City Nat. Bank of Lawton, 121 P. 182, 30 Okl. 614; Edmondston v. Porter (Okl.) 162 P. 692.
[41] Southwestern Bell Telephone Co. v. State, 75 Okl. 42, 181 P. 487.
[42] Nelson v. Hoskinson, 172 P. 993, 103 Kan. 46.
[43] Hubbard v. Alamo Irr. & Mfg. Co., 36 P. 1053, 37 P. 625, 53 Kan. 637.

which has procured of the mortgagors the legal title for plaintiff, such mortgagors are not necessary parties.[44]

When all the parties who enter into a promise receive some benefit from the consideration, whether past or present, the promise is presumed to be joint and several, and one or more may be sued thereon with or without uniting all in the same suit.[45]

Though one of three defendants against whom a joint action is brought for damages is indemnified by one of the other defendants against any loss, such defendant is not a nominal, but is a substantial, party to the action.[46]

Where the loss exceeds the insurance and the insurer has paid the assured, who refuses to sue the wrongdoer, the insurer may sue the wrongdoer in its own name, joining assured as defendant under proper allegations.[47]

A constable and the sureties on his official bond, which is joint and several, may be joined as defendants in an action for a breach of the condition of the bond.[48]

§ 428. Defendants severally liable

"Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and indorsers and guarantors, may all or any of them be included in the same action, at the option of the plaintiff." [49]

Where a guardian, besides the bond given when he was appointed, gave two other bonds as additional security, all the sureties on

[44] Ross v. Noble, 51 P. 792, 6 Kan. App. 361.

[45] Schowalter v. Beard, 63 P. 687, 10 Okl. 454.

[46] Choctaw, O. & G. R. Co. v. Hamilton, 95 P. 972, 21 Okl. 126.

[47] Grain Dealers' Mut. Fire Ins. Co. v. Missouri, K. & T. Ry. Co., 157 P. 1187, 98 Kan. 344.

[48] Schilling v. Black, 31 P. 143, 49 Kan. 552.

[49] Rev. Laws 1910, § 4694.

The holder of a note may, at his option, sue one only of several indorsers. Horne v. Oklahoma State Bank of Atoka, 139 P. 992, 42 Okl. 37.

The payee of a note may, at his option, sue one surety without joining the maker and other sureties. Miller v. State, 52 Okl. 76, 152 P. 409; Baker v. Gaines Bros. Co. (Okl.) 166 P. 159; Francis v. First Nat. Bank, 138 P. 140, 40 Okl. 267; Palmer v. Noe, 48 Okl. 450, 150 P. 462; Thompson v. Grider Implement Co., 128 P. 266, 36 Okl. 165.

Under Rev. Laws 1910, §§ 969, 4694, action may be maintained against surety for hire on a bond given pursuant to section 3881, without joining principal. Fidelity & Deposit Co. of Maryland v. N. S. Sherman Machine & Iron Works, 62 Okl. 29, 161 P. 793.

the several bonds can be joined in one suit to recover the amount due from the guardian.[50]

Where a guardian attaches to his final account a certificate of a purported time deposit in a bank, which deposit was falsely issued, and the ward sued the surety on the guardian's bond, the bank was not entitled to be made a party.[51]

§ 429. Infants

"The defense of an infant must be by a guardian for the suit, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or by a county judge. The appointment cannot be made until after the service of the summons in the action, as directed in this Code." [52]

§ 430. —— Guardian ad litem

"The appointment may be made upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after the return of the summons. If he be under the age of fourteen, or neglect so to apply, the appointment may be made upon the application of any friend of the infant, or that of the plaintiff in the action." [53]

A court has no jurisdiction to appoint a guardian ad litem for an infant defendant until after service of summons in the manner required by statute.[54]

On the failure of the guardian ad litem to properly discharge his duty, it is the duty of the court to protect the infant's rights.[55]

§ 431. Husband and wife

"If a husband and wife be sued together, the wife may defend for her own right; and if her husband neglect to defend, she may defend for his right also." [56]

[50] Abraham v. Harry (Okl.) 165 P. 1154.
[51] Southern Surety Co. v. Jefferson (Okl.) 174 P. 563.
[52] Rev. Laws 1910, § 4688.
[53] Rev. Laws 1910, § 4689.
[54] Bolling v. Campbell, 128 P. 1091, 36 Okl. 671; Same v. Gibson, 128 P. 1093, 36 Okl. 678.
[55] Bolling v. Campbell, 128 P. 1091, 36 Okl. 671; Same v. Gibson, 128 P. 1093, 36 Okl. 678; In re Sanders' Estate (Okl.) 168 P. 197.
[56] Rev. Laws 1910, § 4685.

§ 432. State as defendant

Suits against officers of a state as representing it, in which the state is the real party in interest, and in which a judgment for plaintiff, though nominally against defendants as individuals, will control the action of the state, are suits against the state.[57]

Mandamus brought to require the allowance of a disputed claim growing out of a private contract between the state and parties owning property occupied by state officials is an action brought against the state.[58]

A state cannot be sued except by its consent granted by express legislative enactment.[59]

The immunity of the Oklahoma State Banking Board from liability to suit to control the administration of the depositors' guaranty fund cannot be waived by the unauthorized participation by the board in an agreed statement of facts.[60]

A suit to mandamus the state banking board is a suit against the state.[61]

A suit in mandamus to compel the bank commissioner and the banking board to pay a claim out of the depositors' guaranty fund, being in effect a suit against the state, cannot be maintained without the state's consent.[62]

The Agricultural and Mechanical College, being a public or quasi corporation created and existing by virtue of the laws of Oklahoma, cannot be sued, since the statutes give no such authority.[63]

[57] Love v. Filtsch, 124 P. 30, 33 Okl. 131, 44 L. R. A. (N. S.) 212.

[58] Id.

[59] National Surety Co. v. State Banking Board, 49 Okl. 184, 152 P. 389.

[60] Id.

[61] State Banking Board v. Oklahoma Bankers' Trust Co., 49 Okl. 72, 151 P. 566.

A suit to mandamus the state banking board is a suit against the state, so that, without the state's consent, a judgment making the writ peremptory was error. State Banking Board v. Oklahoma Bankers' Trust Co., 63 Okl. 260, 164 P. 660.

[62] Lovett v. Lankford, 47 Okl. 12, 145 P. 767.

The state banking board and the state banking commissioner constitute a part of the state government and cannot be sued without the state's consent. Lankford v. Schroeder, 47 Okl. 279, 147 P. 1049, L. R. A. 1915F, 623. A suit to compel the state bank examiner to pay a debt out of the state guaranty fund or the bank's assets held not maintainable without the state's consent. Id.

[63] Oklahoma Agricultural & Mechanical College v. Willis, 52 P. 921, 6 Okl. 593, 40 L. R. A. 677.

§ 433. Change of parties and new parties

"The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in." [64]

Where a determination cannot be had without presence of others not parties, and who are interested in the subject-matter, the court may of its own motion order them brought in.[65]

In a legal action in which plaintiff seeks only a money judgment, he cannot be compelled to bring in and admit other parties than those whom he has chosen as defendants.[66]

Where insured sues in her own name on a policy to which a mortgage clause is attached, the court should by proper order protect the mortgagee's rights.[67]

Plaintiff may amend his petition at any time before answer is filed by joining as coplaintiff, a party having an interest in subject-matter of action whether acquired before or after filing of original petition.[68]

Where the grantee of land, which, at the time of the conveyance, was in another's adverse possession, sued in his own name to recover same, it was not error to permit him to amend his petition so as to join his grantor as plaintiff.[69]

Where judgment for defendant must be affirmed, a transfer of defendant's property subsequent to such judgment could not affect rights of plaintiff, and hence application for leave to make defendant's transferees additional parties defendant will be denied.[70]

[64] Rev. Laws 1910, § 4696.

The statute authorizes courts to determine any controversy when it can be done without prejudice, and to order new parties to be brought in. Haynes v. City Nat. Bank of Lawton, 121 P. 182, 30 Okl. 614.

[65] Simpson v. Hillis, 30 Okl. 561, 120 P. 572, Ann. Cas. 1913C, 227.

[66] Modern Woodmen of America v. Terry (Okl.) 171 P. 720.

Where, in an action on a note, in which plaintiff seeks nothing but a money judgment, he cannot be compelled to bring in and to admit other parties than those whom he has chosen as defendants. Goodrich v. Williamson, 63 P. 974, 10 Okl. 588, 617.

[67] Liverpool & London & Globe Ins. Co. v. Cargill, 44 Okl. 735, 145 P. 1134.

[68] Willis v. Cochran (Okl.) 168 P. 658.

[69] Gannon v. Johnston, 140 P. 430, 40 Okl. 695, Ann. Cas. 1915D, 522.

[70] Shaw v. Life & Annuity Ass'n, 165 P. 818, 101 Kan. 235.

Where a third person is made defendant by order of court, after the issues are joined, and such third party claims title to the property sought to be foreclosed, it is not error to overrule a demurrer to the petition filed by the newly made defendant.[71]

Where the cause of action is not changed, and all parties submit to the jurisdiction of the court, and no showing is made for a continuance, it is not error, upon a proper application, after the jury has been impaneled, to make one of a number of co-defendants plaintiff in the action.[72]

Where one of several defendants files a supplemental complaint, showing that he has paid the note in suit, it is proper to order him to be subrogated to the rights of the payee, and to be made a party plaintiff.[73]

The amendment of a petition in an action for damages by the addition of the name of a party plaintiff does not substantially change the claim or defense.[74]

Where an action is regularly pending, and a necessary party to the full determination of the case has been made a defendant, and has been duly served, and enters an appearance, such defendant may not have the action dismissed as to himself on the ground of want of jurisdiction in the court granting the order making him a party defendant.[75]

Since the statute requires one made a party defendant to an action to be notified in the manner provided for notifying original defendants, the court had no jurisdiction to enter a default judgment against one who was made a party defendant to a pending action by an order requiring him to be given but three days' notice to answer.[76]

[71] Simpson v. Hillis, 30 Okl. 561, 120 P. 572, Ann. Cas. 1913C, 227.
[72] Keokuk Falls Imp. Co. v. Kingsland & Douglas Manuf'g Co., 47 P. 484, 5 Okl. 32.
[73] Id.
[74] Hucklebridge v. Atchison, T. & S. F. Ry. Co., 71 P. 814, 66 Kan. 443.
[75] Redlon v. Fish-Keck Co., 54 P. 285, 7 Kan. App. 473.
[76] Moore v. Donahew, 41 P. 579, 3 Okl. 396.

§ 434. —— Substitution—Plaintiff

A trial court, in the furtherance of justice, may permit a new party to be substituted in the place of plaintiff.[77]

Where the interests in the subject-matter of a pending suit are transferred, the court may substitute such party for the original party in the action.[78]

The real parties in interest may be substituted as plaintiffs in an action previously brought in the name of the state upon an executor's bond.[79]

Permitting a plaintiff to amend the petition, so as to charge defendant as a copartnership instead of a corporation as originally

[77] Harper v. Hendricks, 31 P. 734, 49 Kan. 718; Gross v. Lincoln (Okl.) 196 P. 960.

Where, in a suit to restrain execution of a judgment, on the ground that the land levied on was a homestead, the title thereto being at the time in the United States, but subsequently proven up, an amendment, striking out the name of plaintiff and substituting that of his wife, was properly allowed. Rader v. Gvozdanovic, 130 P. 159, 35 Okl. 421.

Under Code, § 40, providing that, where there has been a transfer of interest, an action may be continued in the name of the original party, or the person to whom the transfer is made may be substituted, one who acquired the entire interest in a judgment recovered by a plaintiff who thereafter died may, on a revival of such judgment, be substituted as plaintiff. United States Bldg. Co. v. Walker, 54 P. 1043, 59 Kan. 779.

Code Civ. Proc. § 3917, provides that, in actions against a sheriff for the recovery of property taken under an execution and replevied by the execution debtor, the court may, on application of the defendant and of the party in whose favor the execution issued, permit the latter to be substituted as the defendant; security for costs being given. Held, that an application for permission to be substituted was properly refused where it was unverified, and no security for costs was given, and the property had not been replevied by the execution debtor. Pierce v. Engelkemeier, 61 P. 1047, 10 Okl. 308.

Under Act Cong. July 1, 1898, § 70 (U. S. Comp. St. § 9654), relating to vesting of bankrupt's property in his trustee, the latter is a proper party to sue on contracts or for injury to the property of the bankrupt, but he cannot be substituted as plaintiff in a pending suit for libel on the bankrupt, though the injuries occasioned by such libel may have been the cause of the bankruptcy. Epstein v. Handverker, 116 P. 789, 29 Okl. 337.

[78] Anderson v. Ferguson, 71 P. 225, 12 Okl. 307; Purcell Mill & Elevator Co. v. Canadian Valley Const. Co., 58 Okl. 629, 160 P. 485; Bradford v. Brennan, 12 Okl. 333, 71 P. 655.

On a transfer of real estate pending a litigation in connection therewith, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in his place. Gillett v. Romig, 87 P. 325, 17 Okl. 324.

[79] Hudson v. Barratt, 61 P. 737, 62 Kan. 137.

alleged, being within the discretion of the trial court, is not ground of reversal.[80]

Where, during an action by an infant, by next friend, he attains his majority, he may continue the action in his own name.[81]

Where all the parties are before the court, it is not error, in an action that should be prosecuted by the heirs of a decedent, to permit them to be substituted to prosecute such action in lieu of the administrator, who had no right to maintain it.[82]

It is no abuse of discretion to refuse to permit the owner of a note to be substituted as plaintiff in an action thereon commenced in the name of another, and so continued for years after the attorney for the owner knew thereof, no reason for the delay in the application being shown.[83]

That an order was that a guardian be substituted for plaintiff instead of that the guardian be permitted to prosecute for her ward, was a mere formal irregularity not depriving the court of jurisdiction to proceed in the cause.[84]

§ 435. Disclaimer

"Upon affidavit of a defendant, before answer, in any action upon contract, or for the recovery of personal property, that some third party, without collusion with him, has or makes a claim to the subject of the action, and that he is ready to pay or dispose of the same, as the court may direct, the court may make an order for the safe keeping, or for the payment, or deposit in court or delivery of the subject of the action, to such persons as it may direct, and an order requiring such third party to appear, in a reasonable time, and maintain or relinquish his claim against the defendant. If such third party, being served with a copy of the order, by the sheriff, or such other person as the court may direct, fail to appear, the court

[80] Farmers' & Merchants' Bank v. Bank of Glen Elder, 26 P. 680, 46 Kan. 376.

Where defendant has been sued by a title as a corporation, and put in an answer alleging a partnership, and giving the names of its members, it is proper to allow an amendment substituting their names. Anglo-American Packing & Provision Co. v. Turner Casing Co., 8 P. 403, 34 Kan. 340.

[81] Webb v. Harris, 121 P. 1082, 32 Okl. 491, Ann. Cas. 1914A, 602; Johnson v. Alexander (Okl.) 167 P. 989.

[82] Farrell v. Puthoff, 74 P. 96, 13 Okl. 159.

[83] Switzer v. Eadie, 80 P. 961, 71 Kan. 859.

[84] Jones v. Southwestern Interurban Ry. Co., 141 P. 999, 92 Kan. 809.

may declare him barred of all claim in respect to the subject of the action, against the defendant therein. If such third party appear, he shall be allowed to make himself defendant in the action, in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of the court for the payment, deposit or delivery thereof." [85]

"The provisions of the last section shall be applicable to an action brought against a sheriff or other officer, for the recovery of personal property, taken by him under execution, or for the proceeds of such property so taken and sold by him; and the defendant in any such action shall be entitled to the benefit of those provisions against the party in whose favor the execution issued, upon exhibiting to the court the process under which he acted, with his affidavit that the property, for the recovery of which, or its proceeds, the action is brought, was taken under such process." [86]

§ 436. Substitution of judgment creditor

"In an action against a sheriff or other officer for the recovery of property taken under an execution and replevied by the plaintiff in such action, the court may, upon application of the defendant and of the party in whose favor the execution issued, permit the latter to be substituted as the defendant, security for the cost being given." [87]

ARTICLE IV

INTERVENER

Sections
437. Interplea—Affidavit—Trial.
438. Pleading.
439. Cases outside statute.

§ 437. Interplea—Affidavit—Trial

"Any person claiming property, money, effects or credits attached, may interplead in the cause, verifying the same by affidavit, made by himself, agent or attorney, and issues may be made upon such interpleader and shall be tried as like issues between plaintiff and defendant, and without any unnecessary delay." [88]

[85] Rev. Laws 1910, § 4698.
[86] Rev. Laws 1910, § 4699.
[87] Rev. Laws 1910, § 4700.
[88] Rev. Laws 1910, § 4701.

Where a wife had recovered a judgment awarding her land as alimony she could intervene in a proceeding wherein husband's creditor had attached land.[89]

In an action for divorce for adultery, the correspondent has no right to intervene to protect his reputation.[90]

In an action to enforce a landlord's lien, a petition for intervention was properly denied, where the intervener had no claim sustainable against either plaintiff or defendant.[91]

In an action of strict interpleader, plaintiff must show conflicting claims against him for the same thing, and that he has no interest therein.[92]

Where plaintiffs, who had offered a reward for the apprehension of a criminal, alleged that they were threatened with litigation by different parties claiming the reward, that some one or more of defendants were entitled to receive it, and asked that defendants be required to litigate their claims to the fund which was paid into court, an action in the nature of a bill of interpleader was proper.[93]

§ 438. Pleading

An application for leave to intervene must show that the applicant has been diligent in seeking the aid of the court.[94]

A petition in intervention is demurrable, where it fails to show that the petitioner has or claims an interest adverse to plaintiff, or that she is a necessary party to a determination of the issues.[95]

[89] Germania Nat. Bank v. Duncan, 62 Okl. 144, 161 P. 1077.

[90] Howell v. Herriff, 124 P. 168, 87 Kan. 389, Ann. Cas. 1913E, 429.

[91] Reynolds v. Ryan, 59 Okl. 120, 157 P. 933.

[92] Guaranteed State Bank of Durant v. D'Yarmett (Okl.) 169 P. 639.

Under Code Civ. Proc. § 43, providing that on affidavit of a defendant, in any action on contract, that some third party, without collusion with him, makes a claim to the subject-matter, and that he is ready to dispose of the same as the court may direct, the court may order the delivery of the subject of the action to such person as it may direct, and require such third party to appear in a reasonable time and relinquish his claim against defendant, where, in an action by the assignee of a note against the maker, a third party intervenes, claiming that the note was executed in fraud of creditors, and asking that the liability claimed in plaintiff's behalf be disallowed and the proceeds of the note awarded interpleader, and defendant, by affidavit, admits liability to the extent of the indebtedness then due on the note, the court may order him to pay the amount into court and discharge him from liability. Goodrich v. Williamson, 63 P. 974, 10 Okl. 588, 617.

[93] Taft v. Hyatt, 105 Kan. 35, 180 P. 213.

[94] Gibson v. Ferrell, 94 P. 783, 77 Kan. 454.

[95] Stebbens v. Longhoffer, 44 Okl. 84, 143 P. 671.

A plea of intervention in the nature of a creditor's bill should contain all the necessary allegations within itself, and the interpleader should not be allowed to refer to, and make a part of his plea of intervention, portions of the original petition; but, where such reference is made and trial had on such pleadings, if the Supreme Court can determine that the judgment is right, it will not be disturbed.[96]

In an action to foreclose by a mortgagee, a lienholder who is not made a party in the first instance is entitled to intervene at any time before final judgment, and, by answer in the nature of a cross-petition, ask to have the same foreclosed.[97]

§ 439. Cases outside statute

The district court may, in cases not provided for by the Code, permit one not a party to a suit to intervene either before or after judgment for the protection of some right with reference to the subject-matter of the litigation.[98] However, in an action on a note brought by an assignee against the maker, a third party, claiming that the note was executed by the maker in fraud of creditors of whom interpleader was one, and asking that the liability claimed in plaintiff's behalf be disallowed and the proceeds of the note awarded interpleader, cannot be permitted to intervene without plaintiff's consent, since such proceeding is not one contemplated by statute.[99]

ARTICLE V

DEFECTS, OBJECTIONS, AND AMENDMENTS

Sections

440. Want of interest or capacity.
441. Nonjoinder.
442. Misjoinder.
443. Amendment.

§ 440. Want of interest or capacity

"The due incorporation of any company, claiming in good faith to be a corporation under" the law authorizing the creation of cor-

[96] Blackwell v. Hatch, 73 P. 933, 13 Okl. 169.
[97] Blanshard v. Schwartz, 54 P. 303, 7 Okl. 23.
[98] Gibson v. Ferrell, 94 P. 783, 77 Kan. 454.
[99] Goodrich v. Williamson, 63 P. 974, 10 Okl. 588, 617.

porations, "and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally, in any private suit to which such de facto corporation may be a party; but such inquiry may be had, and action brought, at the suit of the state, in the manner prescribed in civil procedure." [1]

An objection that one has no legal capacity to sue goes to his right to maintain a suit at all, as that he is an idiot, insane, or a minor, and does not include the objection that the action is not prosecuted in the name of the real party in interest.[2]

The want of authority in plaintiff to sue in his own name, in behalf of himself and others, cannot be taken advantage of by demurrer, but must be raised by a motion.[3]

If plaintiff has no legal capacity to sue, the question goes to the sufficiency of his pleading to state a cause of action, and is not waived by failure to demur, answer, or plead a want of capacity. Where the petition of a widow, in an action for wrongful death of her husband against a railroad company, failed to show that the injury occurred while decedent was engaged in interstate commerce, and such fact was first alleged in defendant's answer and not denied in plaintiff's reply, an objection that plaintiff had no capacity to sue under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665) was properly urged for the first time by a motion for judgment on the pleadings. Where plaintiff is a natural person under no legal disability to maintain actions, a failure to state a cause of action in her own favor goes to the sufficiency in substance of the petition, and not to her legal capacity to sue.[4]

The objection that plaintiff has no legal capacity to sue is a ground of demurrer, and when not so raised, is waived.[5] "Want of capacity to sue," within the rule that a plea to the merits waives such want, refers only to some legal disability, such as infancy, illiteracy, or coverture.[6]

In an action on a bond, the question of real party in interest did not concern defendants, not shown to have any defense.[7]

[1] Rev. Laws 1910, § 1212.
[2] Boyce v. Augusta Camp No. 7,429, M. W. A., 78 P. 322, 14 Okl. 642; Logan v. Oklahoma Mill Co., 79 P. 103, 14 Okl. 402.
[3] Martin v. Clay, 56 P. 715, 8 Okl. 46.
[4] Missouri, K. & T. Ry. Co. v. Lenahan, 39 Okl. 283, 135 P. 383.
[5] Binion v. Lyle, 114 P. 618, 28 Okl. 430.
[6] Bailey v. Parry Mfg. Co., 59 Okl. 152, 158 P. 581.
[7] Moore v. Leigh-Head & Co., 48 Okl. 228, 149 P. 1129.

Whether a party in whose name an action is prosecuted is the real party in interest may be raised by answer when such defect does not appear on the face of the pleadings.[8]

The defendant not having taken any objections that plaintiff was not the proper party, or had no capacity to sue, either by demurrer or answer, is deemed to have waived the same.[9]

The rule that a partnership has not a sufficient legal entity to sue in its own name, and must sue in the name of the individuals composing it, is for the benefit of and may be waived by the party sued.[10]

By pleading to the merits a defendant admits plaintiff's capacity to maintain the action.[11]

In a suit to remove a sheriff from office for alleged malfeasance, an objection that the proceeding was instituted by members of the board of county commissioners as individuals, and not as a board, raised by demurrer, was not jurisdictional, and was waived by defendant filing his answer pending determination of the demurrer.[12]

The want of a plaintiff's legal capacity to sue as a corporation where such fact does not affirmatively appear upon the face of the petition, must be raised by special plea in the nature of a plea in abatement, and not by motion for judgment upon the pleading or by objection to the introduction of evidence under the pleadings, and, if not raised by special plea, defendant, by pleading to the merits, admits plaintiff's capacity to sue.[13]

§ 441. Nonjoinder

A nonjoinder of parties plaintiff, appearing on the face of the petition, is waived by a failure to demur on that ground.[14]

On foreclosure of a mechanics' lien by a subcontractor, failure to make the original contractor a party is waived when not objected to by demurrer or answer.[15]

[8] Maxia v. Oklahoma Portland Cement Co. (Okl.) 176 P. 907.
[9] Maelzer v. Swan, 89 P. 1037, 75 Kan. 496.
[10] Kale v. Humphrey (Okl.) 170 P. 223.
[11] Leader Printing Co. v. Lowry, 59 P. 242, 9 Okl. 89.
[12] Meredith v. Choctaw County, 111 P. 197, 28 Okl. 531.
[13] Jantzen v. Emanuel German Baptist Church, 112 P. 1127, 27 Okl. 473, Ann. Cas. 1912C, 659.
[14] Foster v. Board of Com'rs of Lyon County, 64 P. 1037, 63 Kan. 43.
[15] Eberle v. Drennan, 136 P. 162, 40 Okl. 59, 51 L. R. A. (N. S.) 68.

In an action for damages for the location of a public highway, on appeal from the board of county commissioners, an objection made, after the trial has commenced, that the action could not be maintained by the plaintiffs jointly, comes too late.[16]

Where an action for an accounting of a partnership in which the estate is interested is brought by one executor, and the other executors are made defendants, the failure to name them as plaintiffs is not fatal if objection is not taken before judgment.[17]

The rule that all beneficiaries of the trust should be before the court in an action concerning it is one which has been established for the protection of the trustee, in order to avoid his repeated vexation by a multiplicity of suits; and, if he waives the protection of this rule, he may dispense with other parties, where suit is brought by the trustee under a chattel mortgage against one of the beneficiaries of the trust, in which the defendant's rights as presented by a counterclaim may be protected without injury or injustice to other beneficiaries of the trust.[18]

The statute requiring defects in petitions other than those which appear on their face and other than those of jurisdiction and in statements of fact to be set up by answer, does not apply to a petition by a partner who conceals the fact of partnership, and wrongfully brings suit in his own name for an injury to the partnership property; and hence in such case defendant, if ignorant of the partnership until disclosed on the trial, may then raise the objection without the amendment of his answer.[19]

§ 442. Misjoinder

The objection that there is a misjoinder of parties must be raised before trial, or it will be deemed waived.[20]

[16] Commissioners of Lyon County v. Coman, 23 P. 1038, 43 Kan. 676.

[17] Insley v. Shire, 39 P. 713, 54 Kan. 793, 45 Am. St. Rep. 308.

[18] Wyman v. Herard, 59 P. 1009, 9 Okl. 35.

[19] Atchison, T. & S. F. Ry. Co. v. Hucklebridge, 64 P. 58, 62 Kan. 506.

[20] Phillips v. Mitchell (Okl.) 172 P. 85, writ of error dismissed 248 U. S. 531, 39 S. Ct. 7, 63 L. Ed. 405; Schwartzel v. Karnes, 44 P. 41, 2 Kan. App. 782.

Where a municipal corporation sued by an incorrect name answered and went to trial without objection, and judgment was rendered against it in its proper name, it waived the misnomer. City of Kingfisher v. Pratt, 43 P. 1068, 4 Okl. 284.

If one who is made a party to a cause of action appears and answers a

The statute forbidding change of title of a cause, does not conflict with the statute authorizing amendment as to parties.[21]

Where land is conveyed, by two persons jointly by a single deed for a joint consideration, the grantee, when sued for such consideration by the grantors jointly, waives any objection to the misjoinder of plaintiffs by not raising the objection either by answer or demurrer, though at the trial it appears that each of the grantors owned a separate portion of the land, since the Code has abrogated the common-law rule that a legal action brought by two or more persons jointly must entirely fail if the cause of action established at the trial is in favor of a part of the plaintiffs only.[22]

An objection that an agent cannot be joined as defendant in an action against the principal unless his agency is coupled with an interest can only be made by the agent, but he is not in position to make it where he has filed a written offer of judgment.[23]

§ 443. Amendment

Where an attaching officer sues on an indemnity bond for the use of a third person, who recovered judgment against him for a wrongful levy, he may amend so as to allege a cause of action in his own name.[24]

The district court has power, in the furtherance of justice, to permit an amendment of a petition by striking out one given name of plaintiff, and substituting another when it is shown that the first name was used by mistake.[25]

It was not an abuse of discretion to permit a plaintiff styled "Interstate Switch Company of Missouri" to amend by striking out the words "of Missouri," where those words were not a part of its corporate name.[26]

cross-action against him without objection to being made a party or to misjoinder of causes of action, he will be deemed to have waived all objections, except that the facts alleged are not sufficient to state a cause of action against him. State Exch. Bank of Elk City v. National Bank of Commerce of St. Louis, Mo. (Okl.) 174 P. 796, 2 A. L. R. 211; Same v. Traders' Nat. Bank of Kansas City, Mo. (Okl.) 174 P. 799.

[21] Zahn v. Obert, 60 Okl. 118, 159 P. 298; Rev. Laws 1910, §§ 4768, 4790.

[22] Hurd v. Simpson, 27 P. 961, 47 Kan. 372, affirming judgment 26 P. 465, 47 Kan. 245.

[23] Gregg v. Berkshire, 62 P. 550, 10 Kan. App. 579.

[24] Armour Packing Co. v. Orrick, 46 P. 573, 4 Okl. 661.

[25] Weaver v. Young, 14 P. 458, 37 Kan. 70.

[26] Maher v. Interstate Switch Co., 51 P. 286, 58 Kan. 817.

CHAPTER IX

COMMENCEMENT OF ACTION

Sections
444–450. Article I.—Accrual of cause.
451–505. Article II.—Process.
451–460. Division I.—In general.
461–489. Division II.—Service and return.
490–500. Division III.—Service by publication.
501. Division IV.—Exemption from service.
502–505. Division V.—Objections and amendments.
506–511. Article III.—Appearance.

ARTICLE I

ACCRUAL OF CAUSE

Sections
444. Definition.
445. How action commenced
446. Effect—Notice to third persons.
447. Premature actions.
448. Insurance.
449. Waiver.
450. Cure of defect.

§ 444. Definition

A cause of action accrues from the time the right to sue for the breach attaches.[1]

§ 445. How action commenced

"A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon." [2]

Where summons is served in due time, jurisdiction of the subject-matter is acquired as of the date of the filing of the petition and issuance of summons.[3]

[1] Walker v. Bowman, 111 P. 319, 27 Okl. 172, 30 L. R. A. (N. S.) 642, Ann. Cas. 1912B, 839, reversing judgment 105 P. 649, on rehearing.

[2] Rev. Laws 1910, § 4703.

Clerk of court held without authority to issue summons before petition is filed by plaintiff. Atchison, T. & S. F. Ry. Co. v. Lambert, 121 P. 654, 31 Okl. 300, Ann. Cas. 1913E, 329.

[3] Drummond v. Drummond, 49 Okl. 649, 154 P. 514.

Where a party temporarily hands a petition to a clerk of the court, that he may place his file mark thereon, and not for the purpose of allowing it to remain in his custody, or to issue summons thereon, the action is not commenced.[4]

§ 446. —— Effect—Notice to third persons

"When the petition has been filed, the action is pending, so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title; but such notice shall be of no avail unless the summons be served or the first publication made within sixty days after the filing of the petition." [5]

Except as to computation of interest and some other exceptional cases, the rights of parties, in the absence of supplemental pleadings, are fixed as of the time of the commencement of the action.[6]

§ 447. Premature actions

An action cannot be maintained on a debt before it is due.[7]

A provision in a mortgage, securing a note payable two years after date that on default in any interest the whole interest should

[4] Wilkinson v. Elliott, 23 P. 614, 43 Kan. 590, 19 Am. St. Rep. 158.

[5] Rev. Laws 1910, § 4732.

[6] Robertson v. Howard, 112 P. 162, 83 Kan. 453.

[7] Where plaintiff and defendant agreed to furnish equal sums and purchase segregated coal lands of Choctaw and Chickasaw Nations from Department of Interior in name of defendant for their joint use, and agreed on division of land, and certificate was issued to defendant, plaintiff's action for specific performance was prematurely brought, as title did not pass under certificate, and as defendant was not entitled to patent until full compliance with terms of sale. Mahar v. Ward (Okl.) 180 P. 859.

A suit to restrain the publication under Rev. Laws 1910, § 615, of a resolution declaring that a necessity exists for paving, held premature. Pitser v. City of Pawnee, 47 Okl. 559, 149 P. 201.

Where paving assessments against property owners had been ascertained and notice thereof given those who had filed their written objections thereto pursuant to charter of the city of Tulsa, art. 9, § 7, an action brought thereafter to enjoin the collection of such assessment after the objections were overruled was not premature. Arnold v. City of Tulsa, 38 Okl. 129, 132 P. 669.

Under Rev. Laws 1910, §§ 6777, 6778, taxpayers' right of action against city officers paying claim against city pursuant to unlawful or fraudulent contract and against party receiving money does not accrue until performance of conditions under section 6778. State v. Oklahoma City (Okl.) 168 P. 227.

Where creditor's claim has been reduced to judgment and transcript thereof filed in county court, and administrator refuses to pay a claim, though ordered to sell property to pay debts, the creditor may sue sureties on adminis-

become payable related alone to a foreclosure, and did not accelerate time of payment of the note.[8]

Where a note is executed in payment of corporate stock which is to be delivered upon the execution and delivery or upon payment of note, action will not lie thereon until the stock has been delivered or tendered to the maker.[9]

In an action involving separable claims, the right to try those on which a cause of action has accrued is not affected by the fact that the suit is prematurely brought as to the others.[10]

Interest payable at an annual rate will be presumed to be payable annually.[11]

Default in the payment of interest will authorize the exercise of the right given by an acceleration clause.[12]

Where the devisee sued, before the will was probated, to set aside a deed of testator, alleged to have been procured while he was of unsound mind, and after the will was probated filed an amended and supplementary petition, on which the case was tried, the objection that the action was prematurely brought became immaterial.[13]

trator's bond, though there has been no final accounting in county court, in view of Rev. Laws 1910, § 6350. United States Fidelity & Guaranty Co. v. Clutter (Okl.) 179 P. 754.

[8] Alwood v. Harrison (Okl.) 171 P. 325.

[9] Cline v. First Nat. Bank (Okl.) 170 P. 472.

Though, under the mechanic's lien law, a party is not liable to an action by the contractor until the expiration of 60 days from the completion of the work, yet, if the action is brought within the 60 days, and the defendant, instead of making objection by proper motion or plea which can be determined before the merits of the case are tried, presents issues on the merits, and includes within his denial a counterclaim for damages, and also claims a set-off, and asks for a judgment, and proceeds to trial, he cannot thereafter be heard to assert that the action was prematurely brought. Fulkerson v. Kilgore, 64 P. 5, 10 Okl. 655.

[10] Anthony v. Smithson, 78 P. 454, 70 Kan. 132.

[11] F. B. Collins Inv. Co. v. Sanner, 142 P. 318, 42 Okl. 634.

[12] Where a note provided for interest payable annually at 7 per cent. before maturity and 10 per cent. after maturity, the 7 per cent. being evidenced by coupon notes, and where the mortgage provided that on default the holder of the note and mortgage could declare the whole amount and interest due, failure to pay an interest coupon was a breach of the conditions of the mortgage warranting foreclosure. Flesher v. Hubbard, 132 P. 1080, 37 Okl. 587; Jones v. Same, 132 P. 1082, 37 Okl. 592.

Where a debt is evidenced by notes payable in one, two, and three years, in-

[13] Bethany Hospital Co. v. Philippi, 107 P. 530, 82 Kan. 64, 30 L. R. A. (N. S.) 194.

After a mortgagee's exercise of an option making the whole amount secured immediately due on default in principal or interest by filing an action of foreclosure, an offer by the makers of the notes and the mortgage, or purchasers from them, to pay the amounts in default, is not a lawful tender, sufficient to support a plea of tender, since the whole of the debt became due by the exercise of the option.[14]

A mortgage provision that on default in the principal or interest the whole amount secured should be "immediately due" and payable at the holder's option means immediately upon or after holder's election, and does not bind him to elect immediately after default, and renders notes due for purpose of foreclosure and for all purposes, which option exists while default continues, and is not waived by mere delay not benefiting mortgagee nor detrimental to mortgagor.[15]

Where a mortgage provides that the whole debt shall become due at the option of the mortgagee for default in payment of taxes, a tax sale of the mortgaged property does not entitle the mortgagee to foreclose, where all taxes and interest have been thereafter fully paid by the mortgagors and notice given to the mortgagee before suit.[16]

§ 448. —— Insurance

When an insurance policy provided that the loss should not become payable until 60 days after proof and adjustment of loss, including an award of arbitration when arbitration has been required, suit cannot be brought until after 60 days after proof of loss was furnished.[17]

In an action on a policy providing that the insurer shall not be liable until 60 days after notice and proof of loss, where a suit is brought within 60 days after such proof, and after the 60 days

terest payable annually, and a mortgage provides that, on default of any part of the debt, the holder may sell the property on default in principal and interest on the first note and in annual interest on the others, the holder may foreclose. F. B. Collins Inv. Co. v. Sanner, 142 P. 318, 42 Okl. 634.

[14] Damet v. Ætna Life Ins. Co. (Okl.) 179 P. 760, 5 A. L. R. 434.

[15] Damet v. Ætna Life Ins. Co. (Okl.) 179 P. 760, 5 A. L. R. 434.

[16] Fleming v. Franing, 98 P. 961, 22 Okl. 644, 22 L. R. A. (N. S.) 360, 132 Am. St. Rep. 658.

[17] Dixon v. State Mutual Ins. Co., 126 P. 794, 34 Okl. 624, L. R. A. 1915F, 1210.

plaintiff amends his petition, and the insurer files an answer, the action is maintainable on the amended petition.[18]

§ 449. Waiver

Objection that suit is prematurely brought is waived unless presented to the trial court, either by demurrer or answer.[19]

§ 450. Cure of defect

Nonexistence of a cause of action when suit is brought is a fatal defect which cannot be cured by accrual of cause while suit is pending.[20]

[18] Oklahoma Fire Ins. Co. v. Mundel, 141 P. 415, 42 Okl. 270.

Where an action was brought before the expiration of 60 days allowed by the policy after proof of loss, but plaintiff thereafter amended his petition, showing the presentation of proof of loss, and that the 60 days had elapsed, and where the insurer then answered, denying liability, held that the action was maintainable on the amended petition, as against an objection that it was prematurely brought. Western Reciprocal Underwriters' Exchange v. Coon, 38 Okl. 453, 134 P. 22.

[19] Egan v. Vowell (Okl.) 167 P. 205.

The objection that the action is brought before the expiration of 60 days from the completion of the work is waived if defendant proceeds to trial on the merits. El Reno Electric Light & Telephone Co. v. Jennison, 50 P. 144, 5 Okl. 759.

[20] Bank of Chelsea v. School Dist. No. 1, Rogers County, 62 Okl. 185, 162 P. 809.

ARTICLE II

PROCESS

Division I.—In General

Sections
451. Definition.
452. Style of process.
453. Necessity and use of process.
454. Issuance of summons.
455. To another county.
456. Præcipe—Form.
457. Form and requisites.
458. Indorsements.
459. Alias summons.
460. Abuse of process.

Division II.—Service and Return

461. In general.
462. Indorsement.
463. Acceptance of service and appearance.
464. By whom served.
465. Service on only part of defendants.
466. Effect of judgment.
467. Manner of service.
468. Validity and effect of service.
469. Service out of state.
470. Service on corporation.
471. On foreign corporation.
472. On insurance company.
473. Insurance commissioner.
474. Insurance board.
475. On railroad company and stage line—Agent.
476. Where no agent appointed.
477. Where personal service impossible.
478. Actions against counties.
479. Service on infant.
480. Service on sheriff.
481. On inmates of hospitals for insane.
482. Notice or process issued by state board of arbitration.
483. County court.
484. Return.
485. Fees.
486. Conclusiveness.
487. Entering return.
488. Evidence of service.
489. Forms.

Division III.—Service by Publication

490. In general.
491. Service by publication—When authorized.
492. In what actions authorized.
493. On whom authorized.

Sections
494. Unknown heirs or devisees.
495. Affidavit—Forms.
496. Divorce.
497. Order.
498. Publication notice—Form.
499. Mailing with petition.
500. Proof of publication.

DIVISION IV.—EXEMPTION FROM SERVICE

501. Persons attending court—Witnesses.

DIVISION V.—OBJECTIONS AND AMENDMENTS

502. Motion to Quash—Form.
503. Amendment.
504. Where service by publication.
505. Waiver of objections.

DIVISION I.—IN GENERAL

§ 451. Definition

Process in its broadest sense comprehends all proceedings to the accomplishment of an end, including judicial proceedings. Frequently its signification is limited to the means of bringing a party into court. In the Constitution process which at the common law would have run in the name of the king is intended. In the Code process issued from a court is meant.[21]

§ 452. Style of process

"The style of all process shall be: 'The State of Oklahoma.' It shall be under the seal of the court from whence the same shall issue, shall be signed by the clerk, and dated the day it is issued." [22]

§ 453. Necessity and use of process

Process is necessary to jurisdiction. It is indispensable, to give a court jurisdiction in attachment proceedings, that there should be personal service of the summons in the action upon the defendant, or that the order of attachment be levied upon property of the defendant, or that an order of garnishment should be served upon a garnishee having property in his possession belonging to the defendant, or who is indebted to such defendant, otherwise any pro-

[21] McKenna v. Cooper, 101 P. 662, 79 Kan. 847.

[22] Rev. Laws 1910, § 5319.

"The style of all writs and processes shall be 'The State of Oklahoma.'" Const. Okl. art. 7, § 19.

ceedings taken in the cause are coram non judice and void, and the cause must be dismissed.[23]

Defendants in a foreclosure proceeding are by the original summons brought into court for every purpose connected with the case, and are bound to take notice of all following proceedings so that a summons on a cross-petition for foreclosure of a second mortgage is unnecessary.[24]

Where a præcipe for summons and the petition were not signed by the party or his attorney, it is not necessary, on amendment; to issue new summons.[25]

Where service is had by publication in an action to quiet a title founded upon a tax deed, filed with the petition, which is void on its face, it is error to allow amendment of the petition by substituting a valid deed, without any notice to defendant, and then to render judgment against him as for default on the amended petition.[26]

§ 454. Issuance of summons

"All writs and orders for provisional remedies, and process of every kind, shall be issued by the clerks of the several courts, upon a præcipe filed with the clerk demanding the same."[27]

"The summons shall be issued by the clerk upon a written præcipe filed by the plaintiff; shall be under the seal of the court from which the same shall issue, shall be signed by the clerk, and shall be dated the day it is issued. It shall be directed to the sheriff of the county, and command him to notify the defendant or defendants, named therein, that he or they have been sued, and must answer the petition filed by the plaintiff, giving his name, at a time stated therein, or the petition will be taken as true and judgment rendered accordingly; and where the action is on contract for the recovery of money only, there shall be indorsed on the writ the amount, to be furnished in the præcipe, for which, with interest, judgment will be taken, if the defendant fail to answer. If the de-

[23] Central Loan & Trust Co. v. Campbell Commission Co., 49 P. 48, 5 Okl. 396, judgment reversed 19 S. Ct. 346, 173 U. S. 84, 43 L. Ed. 623.

[24] Lawson v. Rush, 101 P. 1009, 80 Kan. 262.

[25] Manspeaker v. Bank of Topeka, 46 P. 1012, 4 Kan. App. 768.

[26] Wood v. Nicolson, 23 P. 587, 43 Kan. 461.

[27] Rev. Laws 1910, § 5328.

fendant fail to appear, judgment shall not be rendered for a larger amount and the costs." [28]

The statute does not require the summons, where personal service is had, to describe the real estate, nor what kind of judgment will be rendered.[29] It does not require summons in foreclosure suit, where personal service has been had, to advise defendant of nature of action and kind of judgment that will be rendered, nor is it necessary to indorse on the writ the amount for which, with interest, default judgment will be taken.[30]

§ 455. —— To another county

"Where the action is rightly brought in any county, a summons shall be issued to any other county against any one or more of the defendants, at the plaintiff's request." [31]

To justify the issuance of a summons to a foreign county and the service of the same on a defendant residing or found there, the action must be rightly brought and the person sued must be rightly joined as a defendant.[32]

If service of summons is not legally obtained on one of several defendants in the county where action is brought, a summons can-

[28] Rev. Laws 1910, § 4705.

[29] Horton v. Haines, 102 P. 121, 23 Okl. 878.

Endorsement is unnecessary, where suit is not for recovery of money only. Id.

[30] Littlefield v. Brown (Okl.) 172 P. 643.

[31] Rev. Laws 1910, § 4706.

Where action is rightfully commenced in any county, summons may issue to any other county and be there served on one or more defendants. Oklahoma City Nat. Bank v. Ezzard, 58 Okl. 251, 159 P. 267, L. R. A. 1918A, 411; Hembrow v. Winsor, 125 P. 22, 87 Kan. 714.

Where nonresident insurance company is sued in county where plaintiff resides, summons to another defendant held properly issued to any other county. Haynes v. City Nat. Bank of Lawton, 121 P. 182, 30 Okl. 614.

In action against guardian for diversion of trust fund and to fix trust on land purchased therewith in his wife's name, properly brought in county where land was, where jurisdiction was obtained on one defendant, a summons could be served on other defendant in another county, warranting establishment of a lien against land. Clingman v. Hill, 104 Kan. 145, 178 P. 243.

Where an action is brought against several defendants, alleging that they are jointly liable for causing the illegal arrest and imprisonment of the plaintiff, and summons is served upon one defendant in the county where the action is brought, a summons may be issued, to any other county against codefendants residing therein. Reiff v. Tressler, 120 P. 360, 86 Kan. 273.

[32] Marshall v. Saline River Land & Mineral Co., 89 P. 905, 75 Kan. 445; Rullman v. Hulse, 5 P. 176, 32 Kan. 598, rehearing denied 7 P. 210, 33 Kan.

not be issued thereon to any other county, and there be legally served on any one or more of the codefendants.[33]

§ 456. Præcipe—Form

Defendant cannot object that summons was issued by the clerk without a præcipe having been filed.[34]

That a præcipe for summons and the petition were not subscribed by the party or his attorney does not oust the jurisdiction where summons was issued by the clerk, and personally served on defendant.[35]

The issuance of a summons upon a præcipe filed by a codefendant is not an error of which defendant can complain, nor will the jurisdiction of the court, after due service of the summons, be affected by reason thereof.[36]

PRÆCIPE FOR SUMMONS

In the District Court of Tulsa County, State of Oklahoma.

A. B., Plaintiff,
v. } No. ——.
C. D., Defendant.

To the Clerk of Said Court:

Issue summons in the above entitled cause, and direct the same to the sheriff of —— county, state of Oklahoma, for the defendant, C. D.

Amount claimed, $——— and interest from the ——— day of ———, 19—, at ——— per cent. per annum.

Action brought for ———.

Defendants required to answer on or before the ——— day of ———, 19—.

Make summons returnable ——— day of ———, A. D. 19—.

Dated this ——— day of ———, A. D. 19—.

X. Y., Attorney for Plaintiff.

670; Wells v. Patton, 33 P. 15, 50 Kan. 732; New Blue Springs Milling Co. v. De Witt, 70 P. 647, 65 Kan. 665.

[33] Bearman v. Hunt (Okl.) 171 P. 1124.

[34] Manspeaker v. Bank of Topeka, 46 P. 1012, 4 Kan. App. 768.

[35] Id.

[36] State Life Ins. Co. of Indianapolis, Ind., v. Oklahoma City Nat. Bank, 97 P. 574, 21 Okl. 823.

§ 457. Form and requisites

A paper purporting to be a summons which is not signed by the clerk of the district court is invalid,[37] as is one not authenticated by the seal of the court.[38]

A summons is not fatally defective by reason of being entitled in the court of P. county, and directed to the sheriff of P. county, when the name of said county had recently been changed.[39]

A summons, issued March 6th, returnable March 16th, in which defendant is required to answer March 26th, was in violation of the statute.[40]

A summons issued and made returnable on a Sunday or a legal holiday does not limit the time in which the defendant may plead, as it is returnable on the day stated, and the effect of the statute is to give to the return upon the next business day the same validity as if made on the designated return day.[41]

§ 458. —— Indorsements

The failure to indorse on the summons, regular in other respects, the amount for which judgment will be taken in case the defendant fails to appear, in an action for the recovery of money only, does not render the judgment rendered in such action void, so that its collection may be enjoined.[42] Such judgment is voidable only, and not absolutely void.[43]

[37] Lindsay v. Kearney County Com'rs, 44 P. 603, 56 Kan. 630.

[38] Kelso v. Norton, 87 P. 184, 74 Kan. 442; McMurray v. Same, 87 P. 184, 74 Kan. 442.

Where the paper purporting to be a copy of a summons, left at the usual place of residence of the defendant by the sheriff, fails to state the name of the plaintiff, the answer day, is not dated, does not have the name of the clerk signed thereto, and has no indication of a seal thereon, it is not a sufficient notice to the defendant to give the court jurisdiction over his person. Jones v. Marshall, 43 P. 840, 3 Kan. App. 529.

[39] Nix v. Gilmer, 50 P. 131, 5 Okl. 740.

[40] State v. Parks, 126 P. 242, 34 Okl. 335.

[41] Harn v. Missouri State Life Ins. Co. (Okl.) 173 P. 214.

A summons fixing the answer day falling on Sunday is a valid summons, since the statute fixes the time for filing answer on the succeeding Monday. Harn v. Amazon Fire Ins. Co. (Okl.) 167 P. 473.

Under Rev. Laws 1910, § 2937, whenever any act of a secular nature, other than a work of necessity or mercy, is to be performed upon a particular day which falls upon a holiday, the act may be performed upon the next business day. Tucker v. Thraves, 50 Okl. 691, 151 P. 598.

[42] Tootle v. Ellis, 65 P. 675, 63 Kan. 422, 88 Am. St. Rep. 246.

A petition and præcipe were filed, and a summons was issued by the clerk,

[43] Dusenberry v. Bennett, 53 P. 82, 7 Kan. App. 123.

The statute is sufficiently complied with when the amount appears on the face of the summons.[44]

The indorsement of a summons need not necessarily be signed by the clerk, and attested with the seal of the court.[45]

§ 459. Alias summons

"When a writ is returned 'Not summoned,' other writs may be issued, until the defendant or defendants shall be summoned; and when defendants reside, in different counties, writs may be issued to such counties at the same time." [46]

Where a foreign corporation has been properly brought into court by service of a summons on its admitted agent for service, that an alias summons is unnecessarily issued and served on a person not its agent does not nullify the previous service.[47]

§ 460. Abuse of process

A plaintiff in replevin, who does not participate in a malicious abuse of the writ by the officer, is not liable for damages resulting from the officer's unlawful acts.[48]

A sheriff who seeks to justify a seizure of property under process in an action brought against him by a stranger to the writ, who claims title anterior to the levy, must show, if he acted under an execution, that it was issued on a valid judgment, and if a writ of attachment, that the party at whose suit it issued was a creditor of the defendant named therein.[49]

Division II.—Service and Return

§ 461. In general

"The summons shall be served and returned by the officer to whom it is delivered, except when issued to any other county than

on which he failed to indorse the amount for which judgment would be taken if defendant did not answer. On the following day plaintiff caused a summons, properly indorsed, to be issued and served. No answer or demurrer having been filed, plaintiff moved for judgment, when defendant objected because the amount claimed was not indorsed on the original summons. Held, that if the first summons were void, the second was good, and judgment was properly entered. Simpson v. Rice, Friedman & Markwell Co., 22 P. 1019, 43 Kan. 22.

[44] Thompson v. Pfeiffer, 56 P. 763, 60 Kan. 409.

[45] Abbey v. W. B. Grimes Dry Goods Co., 24 P. 426, 44 Kan. 415.

[46] Rev. Laws 1910, § 4709.

[47] Supreme Lodge of Heralds of Liberty v. Herrod, 141 P. 269, 42 Okl. 308.

[48] Wurmser v. Stone, 40 P. 993, 1 Kan. App. 131.

[49] Mills v. Talbott, 64 P. 964, 63 Kan. 14.

the one in which the action is commenced, within ten days from its date; and, when issued to another county shall be made returnable in not less than ten nor more than sixty days from the day thereof, at the option of the party having it issued." [50]

The words "personal service" mean actual service by delivering to a person, and not to a proxy.[51]

Statutes prescribing the manner of service of summons are mandatory and must be strictly complied with.[52]

§ 462. Indorsement

"The sheriff shall indorse upon every summons, order of arrest, or for the delivery of property, or of attachment or injunction, the day and hour it was received by him." [53]

§ 463. Acceptance of service and appearance

"An acknowledgment on the back of the summons, or the voluntary appearance of a defendant, is equivalent to service." [54]

§ 464. By whom served

"The summons shall be served by the officer to whom it is directed, who shall indorse on the original writ the time and manner of service. It may also be served by any responsible citizen of the county not a party to or interested in the action, appointed by the officer to whom the summons is directed or by the court in which the action is brought. The authority of such person shall be endorsed on the writ, and the return of service made by any person so appointed, or of any service made out of the state, shall be verified by oath or affirmation of the person making the service." [55]

§ 465. Service on only part of defendants

"Where the action is against two or more defendants, and one or more shall have have been served, but not all of them, the plaintiff may proceed as follows:

"First. If the action be against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise direct; and if he recover judgment, it may be

[50] Rev. Laws 1910, § 4707.
[51] Thisler v. Little, 121 P. 1123, 86 Kan. 787.
[52] Sealey v. Smith (Okl.) 197 P. 490.
[53] Rev. Laws 1910, § 5336.
[54] Rev. Laws 1910, § 4714.
[55] Rev. Laws 1910, § 4710.

entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served; and if they are subject to arrest, against the persons of the defendants served.

"Second. If the action be against defendants severally liable, he may, without prejudice to his rights against those not served, proceed against the defendants served in the same manner as if they were the only defendants." [56]

Where a principal and sureties on a note are sued jointly and the principal is not served, the action may proceed against such sureties as are served, without service on or dismissal as to the principal.[57]

§ 466. —— Effect of judgment

"Nothing in this code shall be so construed as to make a judgment, against one or more defendants jointly or severally liable, a bar to another action against those not served." [58]

§ 467. Manner of service

"The service shall be made by delivering a copy of the summons to the defendant personally or by leaving one at his usual place of residence with some member of his family over fifteen years of age, at any time before the return day." [59]

Leaving a copy at the defendants' usual place of business with his business manager is insufficient to confer jurisdiction of his person.[60]

Service on defendant by leaving a summons at a house where he had household goods stored but where neither he nor his wife had ever lived, though his wife had once been there temporarily, was void because not at his residence.[61]

[56] Rev. Laws 1910, § 4730.
[57] Moorehead v. Daniels, 57 Okl. 298, 153 P. 623.
[58] Rev. Laws 1910, § 4731.
[59] Rev. Laws 1910, § 4711.
Laws 1901, c. 392, § 1, providing that summons shall be issued and served on defendants personally, if residents of the county, refers to personal service on resident defendants, as distinguished from constructive service by publication against nonresident defendants and service by leaving a copy of the summons at the usual place of residence of defendant is a service, within the meaning of the act. Board of Com'rs of Atchison County v. Challiss, 69 P. 173, 65 Kan. 179.
[60] Cohen v. Cochran Grocery Co. (Okl.) 173 P. 642.
[61] O'Neil v. Eppler, 133 P. 705, 90 Kan. 314.

Service by delivering a copy of original process to the wife of a defendant, who had left the state, never intending to return, at his last place of residence within the state, did not give the court jurisdiction, since, after he has removed, he has no "usual place of residence" within the state.[62]

The word "service" means the reading thereof to the person to be served, or the delivery to such person of the original or a copy thereof, and the phrase "service of a notice," without qualification, means a personal service of a written notice.[63]

§ 468. Validity and effect of service

Generally speaking, neither the process nor the action taken under it will be adjudged void when the very thing which ought to be done is specifically commanded, and only that thing is in fact done,[64] at least in the absence of fraud.[65]

When original summons is served, defendants are in court for every purpose connected with the action, and those served are bound to take notice of the filing of a cross-petition by a codefendant.[66]

§ 469. Service out of state

"In all cases where service may be made by publication, personal service of summons may be made out of the state by the sheriff or his deputy of the county in which such service may be made. Such summons shall be issued by the clerk, under seal of the court, and directed to the defendant or defendants to be served, and shall notify him or them that he or they have been sued by the plaintiff or plaintiffs, naming him or them, and requiring him or them to answer the petition filed by the plaintiff or plaintiffs in the clerk's office of the court, which shall be named, within sixty days from the day of service, or the said petition will be taken as true, and judgment rendered accordingly: Provided,

[62] Amsbaugh v. Exchange Bank, 5 P. 384, 33 Kan. 100.

[63] Clemmons v. State, 113 P. 238, 5 Okl. Cr. 119.

[64] Merwin v. Hawker, 1 P. 640, 31 Kan. 222.

[65] Where defendant's trip to Kansas City, Mo., where he was served with process, was not induced by any act of plaintiff, a mere statement by plaintiff's attorney that the contemplated action would be brought in Kansas did not show that the service in Missouri was fraudulent. McLain v. Parker, 129 P. 1140, 88 Kan. 717, judgment affirmed on rehearing 131 P. 153, 88 Kan. 873.

[66] Littlefield v. Brown (Okl.) 172 P. 643.

that such service shall have the same force and effect as service obtained by publication, and no other or greater force or effect." [67]

That such personal service may be had on a nonresident, it is essential that the requisite affidavit be filed, summons be issued, and served, and due proof of such service be made.[68]

The state has full power over all persons and things within its jurisdiction, but cannot extend its process beyond its boundaries.[69]

In action against nonresident to determine an interest in realty in the state, personal service out of state gives the court jurisdiction, not defeated because the petition unites another separate cause of action in which such service would not confer jurisdiction.[70]

§ 470. Service on corporation

"A summons against a corporation may be served upon the president, mayor, chairman of the board of directors, or trustees, or other chief officer, or upon an agent duly appointed to receive service of process; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof." [71]

The prescribed statutory method of serving process upon a corporation is exclusive and must be followed.[72]

Service on a corporation is limited to the class of officers and agents specified in this statute.[73]

Where service is actually made on the proper officer or agent of a corporation a return, failing to show this fact, may be amended.[74]

[67] Rev. Laws 1910, § 4727.

[68] First State Bank of Addington v. Latimer, 48 Okl. 104, 149 P. 1099; Adams v. Baldwin, 31 P. 681, 49 Kan. 781.

[69] Howell v. Manglesdorf, 5 P. 759, 33 Kan. 194.

[70] Culver v. Diamond, 64 Okl. 271, 167 P. 223.

[71] Rev. Laws 1910, § 4715.

[72] Shawnee Tecumseh Traction Co. v. Webster (Okl.) 174 P. 266.

A service of summons upon a director of a domestic corporation, other than the chairman of the board, is unauthorized by Comp. Laws 1909, § 5604; it not appearing in the return that he occupied any office named in the section, though the return recites that the director was the highest officer of the defendant to be found in the county. Oklahoma Fire Ins. Co. v. Barber Asphalt Paving Co., 125 P. 734, 34 Okl. 149. A director is not a "chief officer" or "managing agent" of a domestic corporation, within Comp. Laws 1909, § 5604, and service of summons cannot be made by delivery of a copy to him. Id.

[73] M. Rumely Co. v. Bledsoe, 56 Okl. 180, 155 P. 872.

[74] Id.

When service is not made on one of the chief officers named, the return must show why the service was not so made.[75] It is not ordinarily required that the officer shall state the degree of diligence in attempting to find the chief officer of the defendant or execute process.[76]

Where the service is not on the chief officer, the return must show that he could not be found in the county.[77]

§ 471. —— On foreign corporation

"In all cases where a cause of action shall accrue to a resident or citizen of the state of Oklahoma, by reason of any contract with a foreign corporation doing business in this state, or where any liability on the part of such foreign corporation shall accrue in favor of any citizen or resident of this state, whether in tort or otherwise, and such foreign corporation has not designated an agent in this state upon whom process may be served or has not an officer continuously residing in this state, upon whom summons or other process may be served so as to authorize a personal judgment, service of summons or other process may be had upon the secretary of state, and such service shall be sufficient to give jurisdiction of the person to any court in this state having jurisdiction of the subject-matter, whether sitting in the county where the secretary of state is served or elsewhere in the state." [78]

[75] St. Louis & S. F. R. Co. v. Reed, 59 Okl. 95, 158 P. 399.

[76] Levy v. Tradesmen's State Bank (Okl.) 176 P. 512.

[77] Ozark Marble Co. v. Still, 103 P. 586, 24 Okl. 559.

Under Rev. Laws 1910, § 4715, return of service on domestic corporation, which shows that president was not found in county and that writ was served on managing agent, is sufficient. Colonial Refining Co. v. Lathrop, 64 Okl. 47, 166 P. 747, L. R. A. 1917F, 890.

A return on a summons, showing date of its receipt and that the officer executed the same "in my county," by leaving a true copy with the cashier of the defendant national bank, naming him, "President not in the county," held a sufficient return showing service, as required by Comp. Laws 1909, § 5604. First Nat. Bank of Tishomingo v. Latham, 132 P. 891, 37 Okl. 286; Same v. Ingle, 132 P. 895, 37 Okl. 276.

A summons in error against a corporation served on its secretary without any showing that the other chief officer could not be found in the county was invalid. Cunningham Commission Co. v. Rorer Mill & Elevator Co., 105 P. 676, 25 Okl. 133.

[78] Rev. Laws 1910, § 1339.

Statute held valid. Title Guaranty & Surety Co. v. Slinker, 143 P. 41, 42 Okl. 811.

The phrase "transacting business" means the doing of a series of acts to secure livelihood, profit, or pleasure, not merely the doing of a single act. Ful-

The various methods provided by the statute for obtaining service on foreign corporations are cumulative.[79] Where a foreign corporation has appointed a service agent, service must be made upon such agent, and service on a local agent or manager is insufficient.[80]

The agent may be served either by delivering a copy of the summons to him personally or by leaving the same at his usual place of residence.[81]

Summons issued for defendant corporation and served upon the secretary of state, in the absence of a showing that defendant had either a service agent or an officer in the state upon whom process could be had, was sufficient.[82] Service of summons upon a foreman of a pipe line company, a foreign corporation, is unauthorized by statute, and void.[83]

The appointment of an agent to transact the company's business is not "doing business" within the meaning of the statute.[84] But

ler v. Allen, 46 Okl. 417, 148 P. 1008. A contract to sell machines to be used or sold in the state by the purchaser, and to furnish other machines f. o. b. at the place of business of the seller, a foreign corporation, held not "transacting business" within the state, within Rev. Laws 1910, §§ 1335–1339. Id.

[79] Continental Ins. Co. v. Hull, 38 Okl. 307, 132 P. 657.

[80] Waters Pierce Oil Co. v. Foster, 52 Okl. 412, 153 P. 169.

Where a foreign corporation, other than a railroad or stage company, has complied with the statute and has appointed an agent in this territory for service of process, with his office and principal place of business at an accessible point in the territory, service of process must be made upon such agent and service on any other person is irregular. Bes Line Const. Co. v. Schmidt, 85 P. 711, 16 Okl. 429; Same v. Taylor, 85 P. 713, 16 Okl. 481.

[81] State Life Ins. Co., of Indianapolis, Ind., v. Oklahoma City Nat. Bank, 97 P. 574, 21 Okl. 823.

[82] Municipal Paving Co. v. Herring, 50 Okl. 470, 150 P. 1067.

[83] Gulf Pipe Line Co. v. Vanderberg, 115 P. 782, 28 Okl. 637, 34 L. R. A. (N. S.) 661, Ann. Cas. 1912D, 407.

[84] Verdigris River Land Co. v. Stanfield, 105 P. 337, 25 Okl. 265.

Not "doing business." Where a domestic mercantile corporation contracts with a foreign manufacturing corporation to purchase the latter's goods, and to sell them within the state, it does not constitute "doing business" by the nonresident corporation, and service of summons on the domestic corporation is not service on the foreign corporation. Harrell v. Peters Cartridge Co., 129 P. 872, 36 Okl. 684, 44 L. R. A. (N. S.) 1094. The sending of traveling agents into the state by a foreign manufacturing corporation to advertise its goods and assist the agents of a domestic mercantile corporation in selling them does not constitute "doing business" within the state, and service of summons on the secretary of state is not a valid service on the foreign corporation. Id.

A foreign corporation engaged in buying used automobiles and rebuilding and selling them, which contracted with a resident to canvass for purchasers and forward orders to corporation at Pittsburgh to be filled by delivery f. o. b.,

furnishing him with goods to be sold and which were sold in the state is "doing business" in the state.[85]

Where a foreign surety company collected the premiums on bonds executed prior to statehood and continued such bonds in force, it was "doing business" in the state, within this statute.[86]

A foreign corporation engaged in interstate commerce within the state with a resident thereof is not subject to this statute.[87]

The prosecution of an action for debt by a foreign corporation in a state court is not transacting business.[88]

§ 472. —— On insurance company

"Where the defendant is an incorporated insurance company, and the action is brought in a county in which there is an agency thereof, the service may be upon the chief officer of such agency." [89]

§ 473. —— Insurance commissioner

"Every foreign insurance company shall, "by duly executed instrument filed in his office, constitute and appoint the insurance commissioner, or his successor, its true and lawful attorney, upon whom all lawful processes in any action or legal proceeding against it may be served and therein shall agree that any lawful process against it, which may be served upon its said attorney, shall be of the same force and validity as if served upon the company, and that the authority thereof shall continue in force, irrevocable, as long as any liability of the company remains outstanding in this

was not "doing business" in the state. Auto Trading Co. v. Williams (Okl.) 177 P. 583.

Where a nonresident corporation contracted with a resident to sell and deliver f. o. b. at a point outside the state certain proprietary medicines to be shipped into the state and resold at retail, it did not incur the penalty prescribed by Rev. Laws 1910, § 1338. Dr. Koch Vegetable Tea Co. v. Shumann, 139 P. 1133, 42 Okl. 60.

Nonresident corporation, which contracted with citizen of state, whereby its products were sold and delivered f. o. b. at point outside state, to be sold at retail within designated territory, held not doing business within state. J. R. Watkins Medical Co. of Winona, Minn., v. Coombes (Okl.) 166 P. 1072.

[85] Bailey v. Parry Mfg. Co., 59 Okl. 152, 158 P. 581.

[86] Title Guaranty & Surety Co. v. Slinker, 143 P. 41, 42 Okl. 811.

[87] Hollister v. National Cash Register Co., 55 Okl. 214, 154 P. 1157; Fruit Dispatch Co. v. Wood, 140 P. 1138, 42 Okl. 79.

[88] J. P. Bledsoe & Son v. W. B. Young Supply Co., 44 Okl. 609, 145 P. 1125; Freeman-Sipes Co. v. Corticelli Silk Co., 124 P. 972, 34 Okl. 229.

[89] Rev. Laws 1910, § 4716.

state. Any process issued by any court of record in this state, and served upon such commissioner by the proper officer of the county in which said commissioner may have his office, shall be deemed a sufficient process on said company, and it is hereby made the duty of the insurance commissioner to promptly, after such service of process, forward by registered mail, an exact copy of such notice to the company; or, in case the company is of a foreign country, to the resident manager in this country; and also shall forward a copy thereof to the general agent of said company in this state. For power of attorney, each company shall pay a fee of three dollars, and for each copy of process, the insurance commissioner shall collect the sum of three dollars, which shall be paid by the plaintiff at the time of such service, the same to be recovered by him as a part of the taxable cost, if he prevails in his suit." [90]

Every fraternal beneficiary association "now doing or hereafter admitted to do business within this state, and not having its principal office within this state, and not being organized under the laws of this state, shall appoint in writing the insurance commissioner and his successor in office to be its true and lawful attorney, upon whom all legal process in any action or proceeding against it must be served, and in such writing shall agree that any lawful process against it which is served on said insurance commissioner shall be of the same legal force and validity as if served upon said association, and that the authority shall remain in force as long as any liability against said association shall remain outstanding within this state. Copies of such certificate, certified by said insurance commissioner, shall be deemed sufficient evidence thereof, and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service upon said insurance commissioner shall be deemed sufficient service upon such association: Provided, that such process shall not be returnable until thirty days after such service. When legal process against any such association is served upon the insurance commissioner he shall immediately notify the association of such service by registered letter, prepaid and directed to its secretary or its corresponding officer, and shall within two days after such service forward in the same manner a copy of the process served upon him to such officer. The plaintiff in the action upon which

[90] Sess. Laws 1910–11, p. 202, § 1, amending Rev. Laws 1910, § 3422.

such process was issued shall pay to the insurance commissioner at the time of such service a fee of three dollars which shall be recovered by said plaintiff as a part of his taxable costs, if he prevail in his said action. The insurance commissioner shall keep a record of all processes served upon him, which record shall show the day and hour when such service was made, and when the notice hereinbefore provided for was given to the officers of such association. In all suits in this state against any such association organized under the laws of this state, and having its principal officer in this state, service shall be had upon the chief executive officer or the secretary, or corresponding officer of such association." [91]

§ 474. —— Insurance board

All individuals, partnerships and corporations of this state who shall enter into contracts, as provided by law, to exchange reciprocal or inter-insurance with each other, "shall file with the state insurance board an instrument in writing, executed by him for said subscribers, conditioned that, upon the issuance of certificate of authority provided for" by law, "service of process may be had upon the state insurance board in all suits in this state arising out of such policies, contracts or agreements, which service shall be valid and binding upon all subscribers exchanging at any time reciprocal or inter-insurance contracts through such attorney. Three copies of such process shall be served, and the state insurance board shall file one copy, forward one copy to said attorney, and return one copy with his admission of service. For the copy of the original process accepted by the state insurance board as attorney for service, a fee of three dollars shall be collected from the plaintiff." [92]

§ 475. —— On railroad company and stage line—Agent

"Every railroad company and every stage company doing business in this state or having agents doing business therein for such company, is hereby required to designate some person residing in each county into which its railroad line or stage route may or does run, or in which its business is transacted, on whom all process and notices issued by any court of record or justice of the peace of such county may be served." [93]

[91] Rev. Laws 1910, § 3490.
[92] Sess. Laws 1915, p. 472, § 4.
[93] Rev. Laws 1910, § 4717.

"In every case such railroad company and stage company shall file a certificate of the appointment and designation of such person, in the office of the clerk of the district court of the county in which such person resides; and the service of any process upon the person so designated, in any civil action, shall be deemed and held to be as effectual and complete as if service of such process were made upon the president or other chief officer of such company. Any railroad company or stage company may revoke the appointment and designation of such person upon whom process may be served, as hereinbefore provided, by appointing any other person qualified as above specified, and filing a certificate of such appointment as aforesaid; but every second or subsequent appointment shall also designate the person whose place is to be filled by such appointment." [94]

[94] Rev. Laws 1910, § 4718.

A railroad company ran a short branch of its line from L., Kan., into B. county, for a distance of from four to six miles, for the purpose of taking up cattle from a cattle chute, which it had located at the end of the branch. No station agent was located at the end of the line or at the cattle chute. The short piece of track was managed by the agent at L. Passengers were not carried for hire over the piece of track referred to. No freight charges were made for carrying the cattle upon it. The trains ran irregularly, and only when trains of cattle were to be shipped from the territory; and these trains were billed and charged for from L. No depot building was erected at the point referred to, and no shelter was provided for passengers or freight, and no other freight was carried upon the line except cattle received at the chute mentioned. The point is not referred to in defendant company's printed lists of stations or time schedules, and there is no evidence that the company ever intended to establish a station there. Code Civ. Proc. § 68c, authorizes service of process by leaving a true copy, at any depot or station of such company, with some person in charge thereof, or in the employ of such company. Held, that service on the conductor who has charge of the cattle train at the point in question is not such a service as will be deemed "complete and effectual." Chicago, R. I. & P. Ry. Co. v. Groves, 54 P. 484, 7 Okl. 315.

An action against a railroad company for injury to property upon the line of the company may be brought in any county through or into which the road passes (Civ. Code, § 50), and, when rightly brought, the summons may be issued to any other county of the state and there served upon the president of the company (Civ. Code, §§ 60, 68). Newberry v. Arkansas, K. & C. Ry. Co., 35 P. 210, 52 Kan. 613.

Civ. Code, § 68a, provides that every railroad doing business in this state, or having agents doing business therein for the company, is required to designate some person in each county through which its railroad runs or its business is transacted on whom process and notice may be served. Section 68c provides that, if the company shall fail to designate a person as required

The interests of a federal receiver of a railroad and of the railroad company are not so adverse as to preclude the same person from acting as station agent for the purpose of serving summons upon the railroad company pursuant to the laws while also acting for the receiver.[95]

§ 476. —— Where no agent appointed

"If any railroad or stage company failed to designate or appoint such person, as provided and required in the preceding sections, such process may be served on any local superintendent of repairs, freight agent, agent to sell tickets, or station keeper, of such company, in such county or such process may be served by leaving a copy thereof, certified by the officer to whom the same is directed to be a true copy, at any depot or station of such company in such county, with some person in charge thereof, or in the employ of such company, and such service shall be held and deemed complete and effectual." [96]

by the previous section, such process may be served on any local superintendent of repairs, freight agent, agent to sell tickets or station keeper of such company in the county in which the action is brought, or such process may be served by leaving a copy thereof at any depot or station of such company in such county, with some person in charge thereof or in the employ of such company. Defendant railroad company, after building a railroad, leased it to another company, which took entire charge thereof. Defendant company thereafter exercised no business relations in the state, except as lessor of such railroad. Held, that a summons left with a station agent of the lessee company in charge of the station of such railroad was insufficient, as the lessor company was not doing business within the state, within the meaning of the statute. Le Roy & C. V. A. L. R. Co. v. Sidell, 63 P. 599, 62 Kan. 349.

A return upon a summons against a railroad company that it was "served by delivering a copy thereof, with the indorsements thereon duly certified, to Mr. Fish, agent of the within railroad company," is not sufficient evidence of service, as it fails to show that he is of that class of agents on whom service may be made under Comp. Laws, c. 80, §§ 68, 68a, and chapter 81, § 13. Dickerson v. Burlington & M. R. R. Co., 23 P. 936, 43 Kan. 702.

[95] Missouri, K. & T. Ry. Co. v. Hudson (Okl.) 175 P. 743, 9 A. L. R. 223.

[96] Rev. Laws 1910, § 4719.

In action against receivers of railroad, held, in view of Rev. Laws 1910, § 4719, that where the track and a part of the depot platform were in Latimer county, while the depot building, in which the depot agent resided, was in Le Flore county, personal service on the agent while he was in Latimer county conferred jurisdiction on the court of that county. St. Louis & S. F. R. Co. v. Mobley (Okl.) 174 P. 510.

Under Rev. Laws 1910, § 4719, service of summons upon the superintendent of a railway company is not authorized, it not appearing that he was in

§ 477. —— Where personal service impossible

"In all cases where service of any process cannot be had personally upon the person designated by such company, service may be made by leaving a certified copy of such process at the usual place of residence of such person, or as in the last preceding section, and the same shall be deemed complete and effectual." [97]

§ 478. Actions against counties

"In all legal proceedings against the county process shall be served on the county clerk as the clerk of the board of county commissioners, and whenever suit or proceedings shall be commenced, it shall be the duty of the clerk forthwith to notify the county attorney and lay before the board of county commissioners at their next meeting all the information he may have in regard to such suit or proceedings." [98]

§ 479. Service on infant

"When the defendant is a minor, under the age of fourteen years, the service must be upon him and upon his guardian or father, or if neither of those can be found, then upon his mother, or the person having the care or control of the infant, or with whom he lives. If neither of these can be found, or if the minor be more than fourteen years of age, service on him alone will be sufficient. The manner of service may be the same as in the case of adults." [99]

If the service of summons be not made in strict compliance with the statute, the court has no jurisdiction to render judgment against the minor, and a judgment rendered against the minor, where the statute has not been strictly complied with, is void, and confers no rights upon the parties obtaining the same.[1]

charge of a depot or station of the company. Shawnee Tecumseh Traction Co. v. Webster (Okl.) 174 P. 266.

The service of a summons against a railway company, upon its section foreman, as "a local superintendent of repairs," where it appears that the company has not designated any person upon whom service could be made under section 68a, p. 613, Comp. Laws 1885, is valid. St. Louis & S. F. Ry. Co. v. De Ford, 16 P. 442, 38 Kan. 299.

[97] Rev. Laws 1910, § 4720.

[98] Rev. Laws 1910, § 1501.

[99] Rev. Laws 1910, § 4721.

[1] Sealey v. Smith (Okl.) 197 P. 490.

Service of process upon an infant defendant, as required by this statute, cannot be waived.[2]

§ 480. Service on sheriff

"Every paper required by law to be served on the sheriff, may be served on him in person, or left at his office during his business hours." [3]

§ 481. On inmates of hospitals for insane

"Any citation, order or process required by law to be served on an inmate of the hospitals shall be served only by the medical superintendent in charge thereof or by some one designated by him. Return thereof to the court from which the same issued shall be made by the person making such service, and such service and return shall have the same force and effect as if it had been made by the sheriff of the county." [4]

§ 482. Notice or process issued by state board of arbitration

"Any notice or process issued by the state board of arbitration and conciliation shall be served by any sheriff or constable to whom the same may be directed or in whose hands the same may be placed for service." [5]

[2] Condit v. Condit (Okl.) 168 P. 456; Echols v. Reeburgh, 62 Okl. 67, 161 P. 1065.

Service upon a minor under 14 must be upon him and upon his guardian or father, or upon his mother or the person having his care and control, but service upon a minor above 14 years is sufficient. Jefferson v. Gallagher, 56 Okl. 405, 150 P. 1071. An infant cannot waive the issuance and service of summons, nor can his guardian, guardian ad litem, or attorney waive it for him, and no person can appear for an infant until he is brought into court according to law. Id.; Bolling v. Campbell, 128 P. 1091, 36 Okl. 671; Same v. Gibson, 128 P. 1093, 36 Okl. 678.

[3] Rev. Laws 1910, § 1705.

Gen. St. 1897, c. 88, § 14, declares that every paper required by law to be served on the sheriff may be served on him in person or left at his office during his business hours. The return on a summons read as follows: "Received this writ July 15, 1893, and was commanded therein to summon the following persons, the defendants within named, at the time following, to wit, J. B. N., sheriff, June 24, 1893, by leaving a true certified copy of the within summons at the office of the said sheriff with the undersheriff of said county." Held that, while it did not affirmatively appear from the return that the summons was left at the sheriff's office in his business hours, the return was sufficient. Nipp v. Bower, 61 P. 448, 9 Kan. App. 854.

[4] Sess. Laws 1917, p. 331, § 36.

[5] Rev. Laws 1910, § 3710.

§ 483. County court

"All process issued by the county court shall be served in the same manner, and by the persons and officers as provided for the service of process of the district court with the same fees." [6]

§ 484. Return

"In all cases the return must state the time and manner of service." "The officer or person to whom the summons is directed, must return the same at the time therein stated." [7]

Where a summons is made returnable in nine days from the day of its issuance, and is served one day before the day upon which it is made returnable, and twenty-one days before the defendants are required to answer, neither the summons nor the service thereof, nor a judgment rendered thereon upon default by the defendants, are void or voidable because of the failure of the sheriff to return such summons and file the same with the clerk of the district court until the day after the return day.[8]

A return of service, made and signed by a sheriff, when actually made by his deputy, is irregular, but not invalid.[9]

A return reciting that summons was served on one defendant by delivering to him a true copy thereof and on another by leaving such a copy at his usual place of residence with a member of his family over 16 years of age, and purporting to be signed by the sheriff by his deputy is sufficient.[10]

Where a summons, directed to an officer of another county, and returnable in less than ten days from its date was served and returned within such time it was irregular, but where it gave defendant full statutory time to plead, and in no way prejudiced him, court properly refused to quash summons.[11]

[6] Rev. Laws 1910, § 6191.

[7] Rev. Laws 1910, §§ 4712, 4713.

[8] Miller v. Forbes, 49 P. 705, 6 Kan. App. 617.

[9] Orchard v. Peake, 77 P. 281, 69 Kan. 510.

[10] Bollenbach v. Huber, 46 Okl. 127, 148 P. 716.

A return reciting that the officer "summoned the within-named S. by leaving a certified copy of the within summons, and the indorsements thereon, at the usual place of residence" on a certain day, shows that the copy was left at the usual place of residence of S., and is sufficient. Sexton v. Rock Island Lumber & Mfg. Co., 30 P. 164, 49 Kan. 153.

[11] Continental Ins. Co. v. Norman (Okl.) 176 P. 211.

§ 485. Fees

"When a summons is issued to another county than that in which the action or proceeding is pending, it may be returned by mail, and the sheriff shall be entitled to the same fees as if the summons had issued in the county of which he is sheriff." [12]

§ 486. Conclusiveness

A sheriff's return showing personal service of summons, though not conclusive, is prima facie evidence of its truthfulness, and requires clear and convincing proof to overcome it.[13]

When an officer makes a false return of personal service on which judgment is rendered, such return is not conclusive evidence against the fact.[14]

[12] Rev. Laws 1910, § 4708.

[13] Jones v. Jones, 57 Okl. 442, 154 P. 1136; Humphrey v. Coquillard Wagon Works, 132 P. 899, 37 Okl. 714, 49 L. R. A. (N. S.) 600.

The return of an officer as to service of summons is not conclusive of the facts therein stated, and defendant may appear specially on the return day, and contradict the same. Jones v. Marshall, 43 P. 840, 3 Kan. App. 529.

As between the parties to a suit and their privies, the general rule is that the return of the sheriff to process is conclusive. Warren v. Wilner, 60 P. 745, 61 Kan. 719; Goddard v. Harbour, 44 P. 1055, 56 Kan. 744, 54 Am. St. Rep. 608.

A return that personal service was had on defendant is not open to contradiction or disproof by extrinsic evidence after judgment. Orchard v. Peake, 77 P. 281, 69 Kan. 510.

A sheriff's return with respect to the service of original process may be impeached so far as it states jurisdictional facts, where the facts stated are not within the personal knowledge of the officer, but as to all matters stated in his return which are within the officer's personal knowledge the return is conclusive as between the parties to the action. Eastwood v. Carter, 61 P. 510, 9 Kan. App. 471.

Evidence held insufficient to show fraud in procuring service on nonresident defendant. Van Arsdale-Osborne Brokerage Co. v. Jones, 156 P. 719, 97 Kan. 646.

Return of sheriff reciting that certified copy of summons was left with defendant's wife at his usual place of residence makes out a prima facie case of residence. Jones v. Reser, 61 Okl. 46, 160 P. 58. An official return is sufficient proof of facts which the officer is authorized to certify. Cox v. State, 61 Okl. 182, 160 P. 895.

[14] Ray v. Harrison, 121 P. 633, 32 Okl. 17, Ann. Cas. 1914A, 413.

§ 487. Entering return

The clerk "shall, upon the return of every summons served, enter upon the appearance docket the name of the defendant or defendants summoned, and the day of the service upon each one. The entry shall be evidence of the service of the summons, in case of the loss thereof." [15]

§ 488. Evidence of service

Where the return of a sheriff that he has served a summons personally is ambiguous and open to a construction that but one copy was delivered to both defendants, parol evidence is admissible to show that no service was had on one of the defendants.[16]

Testimony of one on whom a summons was served as secretary of a corporation, tending to show that at the time of service of summons he was not such officer, is admissible to impeach the return on the summons.[17]

Where the original process in an action in the district court is lost, and the appearance docket recites that a summons was issued and returned "Served," the presumption arising therefrom that the return was regular, and the service valid, is not overcome by testimony of a deputy sheriff that he made a service of the summons in the case, which was invalid, in the absence of a showing that no further service was made.[18]

§ 489. Forms

SUMMONS

(Caption.)

The State of Oklahoma, to the Sheriff of ——— County—Greetings:

You are hereby commanded to notify ——— that he (or she) ha— been sued by ——— in the district court of ——— county, Oklahoma, and that ——— must answer the petition of said ——— filed against ——— in said court, in the city of ———, in said county, on or before the ——— day of ———, 19—, or said petition will be taken as true and judgment rendered accordingly.

You will make due return on this summons on the ——— day of ———, A. D. 19—.

[15] Rev. Laws 1910, § 5332.
[16] Jackson v. Tenney, 87 P. 867, 17 Okl. 495.
[17] Schnack v. Boyd, 52 P. 874, 59 Kan. 275.
[18] Stunkle v. Holland, 46 P. 416, 4 Kan. App. 478.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at ———, in said county, this ——— day of ———, A. D. 19—.

———, Court Clerk,
By ———, Deputy.

(Indorsements as follows:)

Suit brought for ———.

If the defendant fail to answer, plaintiff will take judgment for the sum of $———, with interest thereon at the rate of ——— per cent. per annum from the ——— day of ———, 19—, and costs of suit.

———, Court Clerk,
By ———, Deputy.

RETURN OF SUMMONS PERSONALLY SERVED

State of Oklahoma, } ss.:
County of ———. }

Received this writ ———, 19—, and, as commanded therein, I summoned the following persons of the defendant within named at the times following, to wit:

A. B., ———, 19—,

C. D., ———, 19—,

by delivering to each of said defendants, personally, in said county, a true and certified copy of the within summons, with all of the indorsements thereon, and leaving the same with them.

———, Sheriff,
By ———, Deputy.

RETURN OF SUMMONS SERVED ON ADMINISTRATOR

State of Oklahoma, } ss.:
County of ———. }

Received this writ ———, 19—, and, as commanded therein, I summoned the within named defendant, A. B., as administrator of the estate of C. D., deceased, by delivering to said A. B., personally, in said county, a true and certified copy of the within summons, with all of the indorsements thereon.

———, Sheriff,
By ———, Deputy.

RETURN OF SUMMONS SERVED BY LEAVING COPY AT PLACE OF RESIDENCE

State of Oklahoma,
County of ———. } ss.:

Received this writ ———, 19—, and, as commanded therein, I summoned the within named defendant, A. B., on the ——— day of ———, 19—, by leaving for said defendant at his usual place of residence in said county, with C. B., wife (or child, etc.) of said defendant and a person over fifteen years of age, a true and certified copy of the within summons, with all the indorsements thereon.

———, Sheriff,
By ———, Deputy.

RETURN OF SUMMONS SERVED ON CORPORATION

State of Oklahoma,
County of ———. } ss.:

Received this writ ———, 19—, and, as commanded therein, I summoned the within named defendant, A. B. & Co., on the ——— day of ———, 19—, by delivering to C. D., secretary of said corporation, personally, in said county, a true and certified copy of the within summons, with all of the indorsements thereon; the president, mayor, chairman of the board of directors, or trustees, or other chief officer, cashier, or treasurer, not being found in said county.

———, Sheriff,
By ———, Deputy.

Division III.—Service by Publication

§ 490. In general

A state has power by statute to provide for the adjudication of titles to real estate within its limits as against nonresidents who are brought into court only by publication.[19]

The method of obtaining jurisdiction over a person not within the state must be as indicated by the statute.[20]

[19] Cushing v. Cummings (Okl.) 179 P. 762.
[20] First State Bank of Addington v. Lattimer, 48 Okl. 104, 149 P. 1099.

Service by publication is authorized only where plaintiff with due diligence is unable to serve defendant within the state.[21] A valid personal judgment cannot be rendered against a nonresident on publication.[22]

§ 491. Service by publication—When authorized

"Service may be had by publication in any of the following cases: In actions brought under sections 4671 and 4672, article 6, chapter 60 of the Revised Laws of Oklahoma, 1910, where any or all of the defendants reside out of the state, or where it is stated in the affidavit for service by publication that the plaintiff with due diligence is unable to make service of summons upon such defendant or defendants within the state; in actions brought to establish or set aside a will, where any or all of the defendants reside out of the state; in actions brought to obtain a divorce or alimony or annulment of the contract of marriage, where the defendant resides out of the state; in an action brought against a nonresident of the state or a foreign corporation having in this state property or debts owing them, sought to be taken by any of the provisional remedies, or to be appropriated in any way; in actions which relate to, or the subject of which is, real or personal property in this state where any defendant has or claims a lien or interest, actual or contingent therein, or the relief demanded consists wholly or partly in excluding him from any lien or interest therein, and such defendant is a nonresident of the state or a foreign corporation; in all actions where the defendant, being a resident of this state, has departed therefrom or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of summons or keep himself concealed therein with like intent; and, in any of the actions mentioned in this section, against a domestic corporation which has not been legally dissolved and has ceased to maintain an office with some person in charge thereof at the place in this state where, in its article of incorporation, it is stated its principal business is to be transacted, and its officers and agents, if any, upon whom service of summons against such corporation is authorized to be made by the laws of this state are either nonresidents thereof or have departed therefrom or cannot, upon dili-

[21] Richardson v. Howard, 51 Okl. 240, 151 P. 887.
[22] Pettis v. Johnston, 78 Okl. 277, 190 P. 681.

gent inquiry, be found therein, or where it is stated in the affidavit for service by publication, in such action, that the plaintiff with due diligence is unable to make service of summons upon such defendant within this state.

"In any of the actions mentioned in this section wherein the unknown heirs, executors, administrators, devisees, trustees or assigns or any of them, of any deceased person, or the unknown successors, trustees or assigns, if any, of any dissolved corporation, are made defendants; or wherein the plaintiff upon diligent inquiry, is unable to ascertain the whereabouts of a person named as a defendant or whether he is living or dead, and if dead, is unable to ascertain who are his heirs, executors, administrators, devisees, trustees or assigns, if any, or their whereabouts; or wherein the plaintiff upon diligent inquiry, is unable to ascertain whether a corporation, domestic or foreign, named as a defendant, continues to have legal existence or not, or has officers or not, or their names and whereabouts, and if dissolved, is unable to ascertain the names or whereabouts of the successors, trustees or assigns, if any, of such corporation; or wherein the plaintiff cannot ascertain whether a person named as a defendant is living or dead, or, if dead, the names of his heirs, executors, administrators, devisees, trustees or assigns, if any, or cannot ascertain whether a corporation has been dissolved or not, or if dissolved, the names of its successors, trustees, or assigns; publication service may be had upon such unknown party or in the alternative upon such person, if living, or corporation, or if dead, or dissolved, upon the unknown heirs, executors, administrators, trustees, devisees and assigns, if any, of such deceased person, or the unknown successors, trustees, and assigns of such dissolved corporation." [23]

§ 492. In what actions authorized

In an action to quiet title to real estate, brought by one in actual possession against a person who is nonresident and out of the state, service of summons may be made by publication.[24]

Service of summons by publication on a nonresident is unauthorized in an action which joins claims only personal in their nature with claims affecting real estate situated within the state.[25]

[23] Sess. Laws 1919, c. 145, § 1, amending Rev. Laws 1910, § 4722.
[24] Dillon v. Heller, 18 P. 693, 39 Kan. 599.
[25] Zimmerman v. Barnes, 43 P. 764, 56 Kan. 419.

In an action for specific performance to convey land, no jurisdiction of a defendant could be obtained by publication.[26]

In actions relating to real or personal property in state where any defendant has or claims a lien or interest actual or contingent therein, or where the relief demanded consists in excluding him from any interest therein, and where such defendant is a nonresident or a foreign corporation, service by publication may be had.[27]

An action against nonresident of territory of Oklahoma having property attachable therein is an action in which service of summons may be made on defendant by publication.[28]

A temporary restraining order, while a provisional remedy, is not such a remedy as contemplated by the statute allowing service by publication in actions against nonresident having property in the state, sought to be taken by provisional remedies.[29]

§ 493. On whom authorized

In civil actions against residents, jurisdiction must be acquired by personal service or voluntary appearance and cannot be obtained by publication service.[30]

Service of process, under the statute providing for publication, where defendant, being a resident of the state, has departed with the intent to avoid service, was not invalid because the defendant, at the time thereof, resided outside of the state.[31]

In an action against a nonresident, to trace a trust fund into specific property held by him in the state, with notice of the trust, service by publication is sufficient.[32]

[26] Horner v. Ellis, 90 P. 275, 75 Kan. 675, 121 Am. St. Rep. 446.

[27] Cushing v. Cummings (Okl.) 179 P. 762.

[28] Richardson v. Carr (Okl.) 171 P. 476.

[29] Waldock v. Atkins, 60 Okl. 38, 158 P. 587.

[30] Friedman v. First Nat. Bank, 39 Okl. 486, 135 P. 1069, 49 L. R. A. (N. S.) 548.

Where a civil action is commenced against two residents in a county other than that of their residence, and a garnishment summons is issued upon a resident of the county where the action is commenced, and defendants are not served and make no appearance, and service by publication is attempted to be made upon them, a judgment rendered against them by default is void. Friedman v. First Nat. Bank, 39 Okl. 486, 135 P. 1069, 49 L. R. A. (N. S.) 548.

[31] Cole v. Hoeburg, 13 P. 275, 36 Kan. 263.

[32] Reeves v. Pierce, 67 P. 1108, 64 Kan. 502.

§ 494. —— Unknown heirs or devisees

"In actions where it shall be necessary to make the heirs or devisees of any deceased person defendants, and it shall appear by the affidavit of the plaintiff, annexed to his petition, that the name of such heirs or devisees, or any of them, and their residences, are unknown to the plaintiff, proceedings may be had against such unknown heirs or devisees, without naming them. In such actions service may be had upon such defendants by publication and the notice shall be published as in other cases of service by publication." [33]

The term "unknown heirs," where the relief demanded is to exclude defendants from any interest in real property, means all kinds of heirs, including heirs of heirs of such defendants as well as the legatees of heirs.[34]

In a suit to quiet title brought against unknown heirs of one erroneously supposed to be dead, and unknown heirs of those from whom his right and title descended, where service was attempted by publication, such one is not a party to action, and court acquired no jurisdiction of him by such attempted service.[35]

§ 495. Affidavit—Form

"Before service can be made by publication, an affidavit must be filed stating that the plaintiff, with due diligence, is unable to make service of the summons within the state upon the defendant to be served by publication, and showing that the case if one of those mentioned in the preceding section. When such affidavit is filed the party may proceed to make service by publication.

"In actions against unknown heirs, executors, administrators, devisees, trustees and assigns, of any deceased person, or in the alternative against a person or his unknown heirs, executors, administrators, devisees and assigns, or against a corporation or its unknown successors, trustees and assigns, the affidavit shall state that the plaintiff does not know and with diligence is unable to ascertain the names or whereabouts of any such heirs, executors, administrators, devisees, trustees or assigns, or successors, trus-

[33] Rev. Laws 1910, § 4729.
[34] Howell v. Garton, 108 P. 844, 82 Kan. 495.
[35] Buck v. Simpson (Okl.) 166 P. 146, L. R. A. 1918F, 604.

tees or assigns of a corporation, or with diligence is unable to ascertain whether a person named in the alternative is living or dead, or his whereabouts, and if he be dead, is unable to ascertain the names or whereabouts of his heirs, executors, administrators, devisees, trustees or assigns, or is unable to ascertain whether a corporation named in the alternative is legally existing or dissolved, and if not in existence, is unable to ascertain the names or whereabouts of its officers, successors, trustees or assigns, if any. When such affidavit is filed the party may proceed to make service, in such actions, by publication. Statements as to any and all kinds of defendants, natural or corporate, known or unknown, may be united in one affidavit for service by publication, and notice to all of them may be included in one publication notice." [36]

Where publication is relied on to confer jurisdiction, the affidavit as well as the publication notice are jurisdictional matters, and both must comply with the statute.[37]

It is not necessary to allege in terms that the action is one of those enumerated in the statute, where the affidavit to obtain service by publication mentions sufficient grounds.[38]

[36] Sess. Laws 1919, c. 145, § 2, amending Rev. Laws 1910, § 4723.

Under Code Civ. Proc. § 72, enumerating the cases in which service may be had by publication, and section 73, requiring an affidavit for such service to show "that the case is one of those mentioned" by section 72, an affidavit stating that the action is one "to quiet title to real estate, as provided by section 72," does not sufficiently show that the case is "one of those mentioned." Leavenworth, T. & S. W. Ry. Co. v. Stone, 55 P. 346, 60 Kan. 57. An affidavit for service by publication under Code Civ. Proc. §§ 72, 73, in an action concerning real estate, must state the location of the land because it is a local action. Id.

An affidavit for service by publication was entitled in the cause, but the venue was stated thus: "State of Kansas, ——— County." Held sufficient. Baker v. Agricultural Land Co., 61 P. 412, 62 Kan. 79.

[37] Cordray v. Cordray, 91 P. 781, 19 Okl. 36.

[38] Chaplin v. First Bank of Hitchcock (Okl.) 181 P. 497; Lausten v. Union Nat. Bank of Bartlesville (Okl.) 173 P. 823.

An affidavit for service by publication need not state that the action is one of those mentioned in Code Civ. Proc. § 78 (Gen. St. 1909, § 5671), or that it is one in which service by publication can be made, but should state facts showing that the action is one in which such service is authorized. Harvey v. Harvey, 118 P. 1038, 85 Kan. 689. An affidavit for service by publication which alleges that the action is brought to set aside a deed to plaintiff's homestead and to quiet title, that defendant is a nonresident, that personal service cannot be had, and that plaintiff has a just cause of action is sufficient as against an attack by a suit to set aside the judgment brought more than three years after judgment. Id.

If there is a total want of evidence upon a vital point in the affidavit for publication, the court acquires no jurisdiction by publication of the summons; but where there is not an entire omission to state some material fact, but it is inferentially or insufficiently set forth, the proceedings are merely voidable.[39]

Certain averments omitted from the affidavit may be inferred from facts alleged;[40] but there must be some substantial allegation on which to base the inference,[41] and the facts showing due diligence to obtain personal service in the state should be set up,[42]

[39] Harris v. Claflin, 13 P. 830, 36 Kan. 543.

[40] Affidavit for summons by publication under Rev. Laws 1910, §§ 4722, 4723, made in case specified in section 4722, and alleging inability to make summons, otherwise than by publication, held sufficient to support judgment based on such service as against attack on ground that defect in affidavit rendered judgment void, as averment omitted from affidavit would be inferred. Richardson v. Carr (Okl.) 171 P. 476.

Under Gen. St. 1915, §§ 6969, 6970, affidavit in action against railroad for damages to live stock in transit for service by publication, based on garnishment proceedings, held sufficient. Dye v. Denver & R. G. R. Co., 101 Kan. 666, 168 P. 1087.

In an action to reform and foreclose a mortgage, service of summons by publication was obtained on affidavit that "defendant has removed from said county of Shawnee, and now resides in that region of country known as 'Pikes' Peak,' and that service of summons cannot be made on said defendant within this territory." Held that, when attacked in a collateral proceeding, the affidavit was sufficient, though it did not mention the reformation, nor directly state that defendant was a nonresident of Kansas. Carey v. Reeves, 5 P. 22, 32 Kan. 718.

An affidavit to obtain service by publication, which inferentially states all material facts required by Gen. St. 1901, § 4507, is not void because failing to state that plaintiffs were unable to make service "with due diligence," but is at most only voidable. Morris v. Robbins, 111 P. 470, 83 Kan. 335.

The omission of an allegation in an affidavit for service by publication that service could not be had "by due diligence" is immaterial. Smith v. United States Sugar & Land Co., 108 P. 860, 82 Kan. 539.

[41] Ballew v. Young, 103 P. 623, 24 Okl. 182, 23 L. R. A. (N. S.) 1084.

Where the affidavit for publication does not state directly, inferentially, or in any other way, that the action brought is one of those mentioned in Civ. Code, § 72, the affidavit is fatally defective, and service by publication cannot be obtained thereon. Harris v. Claflin, 13 P. 830, 36 Kan. 543.

An affidavit for publication is insufficient which does not state that the case is within Civ. Code, § 72, enumerating the cases in which service by publication may be had. Grouch v. Martin, 27 P. 985, 47 Kan. 313. An attempted service of process by publication is insufficient, where the affidavit for publication does not state that plaintiff is unable to obtain personal service on defendant. Id.

[42] Nicoll v. Midland Savings & Loan Co. of Denver, Colo., 21 Okl. 591, 96 Pac. 744.

Affidavit for summons by publication, averring that whereabouts of de-

unless it is alleged that defendant is a nonresident;[43] mere conclusions or hearsay being insufficient.[44]

An affidavit for service by publication that defendant is a nonresident of Oklahoma and a resident of another state, without show-

fendants could not be known by affiant, that he had used due diligence and had made trips to find them, was insufficient, where facts as to due diligence used as to service in the state were not set up. Rentie v. Rentie (Okl.) 172 P. 1083.

Where an affidavit for notice by publication was fatally defective, the court obtained no jurisdiction over the person of defendants. Griffin v. Jones, 45 Okl. 305, 147 P. 1024. An affidavit filed for a notice of publication held insufficient, where it failed to allege any facts showing that defendants could not be served by the exercise of diligence, or that they were not in the state. Id.

Where an affidavit for service on a foreign corporation by publication did not show that such corporation had not complied with the laws relative to foreign corporations in appointing and designating agents on whom service might be had, nor state facts showing that due diligence had been used to obtain personal service a judgment rendered thereon was void. Nicoll v. Midland Savings & Loan Co. of Denver, Colo., 96 P. 744, 21 Okl. 591.

Under Code Civ. Proc. § 79 (Gen. St. 1909, § 5672), which takes the place of section 73 of the old code, an affidavit for service by publication which wholly fails to show that plaintiff diligently inquired as to the residence of the defendants to be served by publication and was unable to learn same is void. Van Gundy v. Shewey, 133 P. 720, 90 Kan. 253, 47 L. R. A. (N. S.) 645.

[43] An affidavit for service on nonresident by publication, otherwise sufficient, was not void or voidable because not stating facts showing that plaintiff in exercise of due diligence was unable to make service of summons. Continental Gin Co. v. Arnold (Okl.) 167 P. 613, L. R. A. 1918B, 511.

Where the element of nonresidence of defendant is absent, the affidavit for publication must either show proper active effort to find and serve him within the state or facts showing that such effort would be futile. Richardson v. Howard, 51 Okl. 240, 151 P. 887. Where defendant in a mortgage foreclosure is a nonresident, and plaintiff neither knows nor has reason to believe that he may be served within the state, the affidavit for publication need not show active diligence to serve him within the state. Id.

Where an affidavit for service by publication is otherwise sufficient, it is not void or voidable because facts are not stated therein showing that plaintiff, by the use of due diligence, was unable to make service in the state. Harris-Lipsitz Co. v. Oldham, 56 Okl. 124, 155 P. 865.

Affidavit that defendants are nonresidents, that plaintiff by due diligence

[44] An affidavit for service by publication, which states that the defendant is a nonresident, as affiant is advised and informed, and that the defendant's last-known residence was Claremore, Okl., but that the defendant has left the said place, as affiant is informed and believes, is a mere hearsay declaration, insufficient as a basis for service by publication. Holland v. Holland (Okl.) 173 P. 1139.

ing that service could not be had on him in Oklahoma, is insufficient.[45]

An affidavit made some time after the petition is filed, which states that defendant resides out of the state and is a nonresident thereof is sufficient without relating back and averring that he was a nonresident at the time the petition was filed.[46]

The affidavit may be made by an attorney.[47]

AFFIDAVIT TO OBTAIN SERVICE BY PUBLICATION

(Caption.)

A. B., being duly sworn according to law, says:

That he is the (agent, or attorney, for) above named plaintiff.

That on the ——— day of ———, 19—, he caused a summons to be issued in the above entitled cause against the above named

is unable to make service of summons on them within territory, and that action is to quiet title to described land is sufficient to authorize service by publication. Gray v. Gray, 57 Okl. 667, 157 P. 730.

An affidavit for service by publication that defendant is a nonresident of the state, and service cannot be had upon him therein, and otherwise sufficient, is valid, though not stating facts showing that service cannot be made by due diligence. Ballew v. Young, 103 P. 623, 24 Okl. 182, 23 L. R. A. (N. S.) 1084.

Affidavit for service by publication held sufficient without stating the facts as to diligence used. Tolbert v. State Bank of Paden, 121 P. 212, 30 Okl. 403.

An affidavit to obtain service by publication held to comply with the requirements of Rev. Laws 1910, § 4722. Oates v. Freeman, 57 Okl. 449, 157 P. 74.

Under Sess. Laws 1889, c. 107, § 2, providing that an affidavit for service by publication must allege that plaintiff, with due diligence, is unable to make service of summons on defendant, an allegation that defendant is a nonresident of the state, and service cannot be had upon him within the state, is sufficient. Washburn v. Buchanan, 52 Kan. 417, 34 P. 1049.

An affidavit for publication, alleging nonresidence, negatives a usual place of residence in the state where summons can be served, and personal absence from the state precludes personal delivery of summons. Ennis v. Grimes, 102 P. 454, 80 Kan. 429.

An affidavit for service of process by publication, filed on January 17, 1861, that defendant resided within the region of country known as "Pike's Peak," which was then within the territory of Kansas, shows on its face that defendant is not a nonresident of Kansas, and service on the ground of nonresidence (Comp. Laws 1862, c. 26, tits. 4, 5; Code Civ. Proc. § 1859) is unauthorized. Carey v. Reeves, 26 P. 951, 46 Kan. 571.

[45] Fenton v. Burleson, 124 P. 1087, 33 Okl. 230.

[46] Bogle v. Gordon, 17 P. 857, 39 Kan. 31.

[47] Tolbert v. State Bank of Paden, 121 P. 212, 30 Okl. 403.

defendant C. D., but was unable with due diligence to make service of the same upon said defendant within said state.

That the defendant, C. D., is a nonresident of the state of Oklahoma (or is a foreign corporation) having property in this state, which plaintiff is seeking in this action to have taken by attachment (or, garnishment).

That said defendant's last known place of residence was ——— (or, is unknown to this plaintiff).

Affiant further says that this action is brought for (specify relief demanded), and that the said plaintiff wishes to obtain service on said defendant by publication; and further affiant saith not.

A. B.

Subscribed in my presence and sworn to before me this ——— day of ———, 19—

———, Court Clerk,

By ———, Deputy.

§ 496. —— Divorce

An affidavit for service by publication in divorce, that the whereabouts of defendant are unknown and her post office address cannot be ascertained by any means within affiant's control, carries a sufficient inference of diligent inquiry to save the affidavit from total insufficiency.[48]

It is not necessary in a divorce case that the clerk of the district court should issue a summons, where service of summons is made by publication.[49] In a divorce case, where an affidavit is filed stating that the residence of the defendant is unknown to the plaintiff, and cannot be ascertained by any means within the control of the plaintiff, in lieu of sending a copy of the petition and a copy of the publication notice to the defendant within three days after the date of the first publication, it is not necessary that the affidavit should be filed within the same period.[50]

[48] Bell v. Bell, 156 P. 778, 97 Kan. 616.

[49] Larimer v. Knoyle, 23 P. 487, 43 Kan. 338.

[50] Id.

Code Civ. Proc. § 640, provides that when, in a suit for divorce, service is made by publication, a copy of the petition with a copy of the notice attached shall be mailed to the defendant within three days after the first publication, unless the plaintiff shall make and file an affidavit that the defendant's residence is unknown and cannot be ascertained. Held, that the affidavit need not be filed within three days after the first publication. Ensign v. Ensign, 26 P. 7, 45 Kan. 612.

An affidavit for service by publication under Civ. Code Proc. § 73 (Gen.

§ 497. Order

Where an affidavit was presented to obtain an order to serve defendants by publication which was granted and notice of publication given, and a decree to quiet title was entered by default, the fact that 37 days intervened between the date when the affidavit was sworn to and when the order was made did not render the affidavit stale in that the order should have been made on facts then shown to exist.[51]

§ 498. Publication notice—Form

"The publication must be made three (3) consecutive weeks in some newspaper authorized by law to publish legal notices printed in the county where the petition is filed if there be any printed in such county, and if there be none, then in some such newspaper printed in this State of general circulation in that county. It shall state the court in which the petition is filed, the names of the parties, or where unknown, shall describe them as the unknown heirs, executors, administrators, devisees, trustees and assigns of such person, or the unknown successors, trustees and assigns of such corporation and must notify the defendants thus to be served that he or they have been sued and must answer the petition filed by the plaintiff on or before a time to be stated (which shall not be less than forty-one (41) days from the date of the first publica-

St. 1905, § 4950), alleging that affiant was the plaintiff, that she had filed a petition against the defendant to obtain a divorce, that defendant was a nonresident of the state, and that plaintiff wishes to obtain service by publication, is sufficient, and due publication of notice will confer jurisdiction to grant a divorce. Roberts v. Fagan, 92 P. 559, 76 Kan. 536. Civ. Code Proc. § 73 (Gen. St. 1905, § 4950), not requiring the residence of plaintiff to be stated in the affidavit for service by publication in divorce, such a statement is unnecessary. Id.

An affidavit, in an action for divorce, as a basis for service by publication, alleging that S. is the plaintiff and that defendant is not a resident of the territory, "but to the best of her knowledge and belief is a resident of ———, and that service of summons in this case cannot be had upon the said defendant in the territory," does not comply with Wilson's Rev. & Ann. St. 1903, § 4377, and a judgment rendered thereon is void for want of jurisdiction; the affidavit failing to state what diligence was used, or the nature of the action, and that at the time of the making of the affidavit defendant was out of the territory. Cordray v. Cordray, 91 P. 781, 19 Okl. 36.

[51] Aherne v. Wa Keeney Land & Investment Co., 108 P. 842, 82 Kan. 435.

tion), or the petition will be taken as true, and judgment, the nature of which shall be stated, will be rendered accordingly." [52]

A publication notice which advises defendant of the nature of the action and of his interest therein is sufficient.[53]

A publication notice need not mention any of the defendants except those to be served by publication; [54] but the latter must be designated or described with reasonable certainty.[55] It is suffi-

[52] Sess. Laws 1919, c. 145, § 3, amending Rev. Laws 1910, § 4725.

A publication notice held to comply with the requirements of Rev. Laws 1910, § 4725. Oates v. Freeman, 57 Okl. 449, 157 P. 74.

A publication notice, which in its heading contains the name of the court and the county and state, which is attested by the clerk of the district court with the seal of the district court attached thereto, and which notice describes the land as being in the same county named in the heading, when construed liberally, as required by Code, § 4, is sufficient, so far as stating the court in which the petition is filed, under the provisions of Code, § 74. Townsend v. Burr, 60 P. 477, 9 Kan. App. 810.

Newspaper.—A newspaper published on each day of the week except Monday is a "daily newspaper." Alley v. City of Muskogee, 53 Okl. 230, 156 P. 315.

Evidence held to show that a certain newspaper was a "newspaper of the county having general circulation therein." Hesler v. Coldron, 116 P. 787, 29 Okl. 216.

Kansas rule.—The notice required to obtain service by publication is not process within Const. art. 3, § 17, or Code Civ. Proc. § 700 (Gen. St. 1901, § 5196), and need not bear the style "The State of Kansas," nor the seal of the court in which suit is pending, nor be signed or issued by the clerk. McKenna v. Cooper, 101 P. 662, 79 Kan. 847.

That publication notices in divorce proceedings did not run in the name of the state did not render the divorces void. Gordon v. Munn, 125 P. 1, 87 Kan. 624, Ann. Cas. 1914A, 783, rehearing denied 127 P. 764, 88 Kan. 72, Ann. Cas. 1914A. 783.

[53] Head v. Daniels, 15 P. 911, 38 Kan. 1.

In an action to quiet title, a notice by publication which describes the real estate by the lot and block numbers of an addition to a city according to the recorded plat thereof, which plat designates the land by its proper government subdivision, which had been of record for a number of years and recognized by the city and the public generally and acted upon by the authorities for the purposes of taxation, sufficiently identifies the property affected to give the court jurisdiction as against defendant who might have impeached the plat as invalid. Caldwell v. Bigger, 90 P. 1095, 76 Kan. 49.

[54] Head v. Daniels, 15 P. 911, 38 Kan. 1.

[55] Service of summons by publication on a married woman, who had borne the name of "Durham" for nearly 20 years, by her maiden name of "Morris," was invalid. Morris v. Tracy, 48 P. 571, 58 Kan. 137.

In an action to quiet title, where the only attempt to obtain jurisdiction of Florence D. Whitney, an unmarried woman was by publication in which she was referred to as "——— Whitney, and ——— Whitney, his wife, whose

cient, however, where the name contained in the notice aud the correct name of the defendant are idem sonans.[56]

PUBLICATION NOTICE

(Caption.)

The State of Oklahoma, to the Above Named Defendant, C. D.—Greeting:

You will take notice that you have been sued in the above named court by the above named plaintiff for (state relief asked for), and you must answer the petition filed therein by said plaintiff on or before the ——— day of ———, 19—, or said petition will be taken as true and a judgment for said plaintiff will be rendered accordingly in the sum of ——— dollars, and interest thereon at the rate of ——— per cent. per annum from the ——— day of ———, 19—, and costs, and in the attachment therein had and granted.

———, Court Clerk,

By ———, Deputy.

X. Y., Attorney for Plaintiff.

§ 499. —— Mailing with petition

"Where service by publication is proper a copy of the petition, with copy of the publication notice attached thereto, shall, within six days after the first publication is made, be inclosed in an envelope addressed to the defendant at his place of residence or business, postage paid, and deposited in the nearest post-office, unless the plaintiff shall make and file an affidavit that such residence or place of business is unknown to the plaintiff and cannot be ascertained by any means within the control of the plaintiff." [57]

This statute is mandatory.[58]

first names are unknown," without any other description, and where there was no appearance or waiver of summons, the court did not acquire jurisdiction of her, and a judgment against her on such notice is void. Whitney v. Masemore, 89 P. 914, 75 Kan. 522, 11 L. R. A. (N. S.) 676, 121 Am. St. Rep. 442.

[56] A notice of publication of summons, describing a defendant whose name was Elizabeth D. Borthwick as Elizabeth D. Bothwick, was sufficient; the names being idem sonans. Harrel v. Neef, 102 P. 838, 80 Kan. 348.

A default judgment quieting title based upon service made by publishing a notice which stated defendant's name as Joseph Remer is valid against Joseph Renner; the names being idem sonans. Puckett v. Hetzer, 82 Kan. 726, 109 P. 285, 136 Am. St. Rep. 127.

[57] Rev. Laws 1910, § 4724.

[58] Rev. Laws 1910, § 4724, requiring copy of petition with copy of publica-

§ 500. Proof of publication

"Service by publication shall be deemed complete when it shall have been made in the manner and for the time prescribed in the preceding section; and such service shall be proved by the affidavit of the printer; or his foreman or principal clerk, or other person knowing the same. No judgment by default shall be entered on such service until proof thereof be made, and approved by the court, and filed." [59]

Where service is had upon a defendant by publication, and the affidavit of the printer does not show that the notice was published the requisite length of time before answer day, and the judgment founded upon such service is challenged for want of sufficient publication, the court may examine copies of the newspaper in which the notice appeared, and also receive evidence of the publisher of the paper and other parties, to prove that the publication was had for a sufficient time to comply with the provisions of the statute.[60]

An order approving service of publication on defendants after the evidence is submitted is not an abuse of discretion.[61]

PROOF OF PUBLICATION

(Caption.)

G. H., of lawful age, being first duly sworn, on his oath, says: That he is the publisher (or editor) of the ———, a newspaper printed and of general circulation in ——— county, state of Oklahoma, and that the notice by publication, a copy of which is hereto attached, was published in said paper for ——— consecutive days (or weeks) the first publication thereof being on the ——— day

tion notice attached to be mailed to defendant's address within six days after first publication, unless plaintiff files affidavit that residence or place of business is unknown and cannot be ascertained, is mandatory. Stumpff v. Price (Okl.) 177 P. 109. Where there are two nonresident defendants, a copy of petition and publication notice addressed to them jointly at their place of residence does not comply with Rev. Laws 1910, § 4724, as that shows service only on one defendant, and uncertainty to which makes publication service prima facie void as to both, so that court did not acquire jurisdiction. Id. It is mandatory, and a condition precedent to the granting of a divorce. Rodgers v. Nichols, 83 P. 923, 15 Okl. 579.

[59] Rev. Laws 1910, § 4726.

[60] Robinson v. Hall, 5 P. 763, 33 Kan. 139.

[61] Earl v. Cotton, 96 P. 348, 78 Kan. 405.

of ———, 19—, and the last publication thereof being on the ——— day of ———, 19—. G. H.

Subscribed and sworn to before me this ——— day of ———, 19—.

X. Y., Notary Public.

My commission expires ———, 19—.

(Attach copy of publication notice.)

Division IV.—Exemption from Service

§ 501. Persons attending court—Witnesses

One attending court as a material witness or as a suitor in a county other than that of his residence is exempt from service of summons in action brought in that county, though his attendance is not in obedience to a subpœna.[62]

This exemption allowed a witness extends to the service of summons on him in his representative capacity as managing officer or agent of a corporation.[63]

[62] Bearman v. Hunt (Okl.) 171 P. 1124; Rev. Laws 1910, § 5064.

A suitor who is in attendance, either in his own behalf or under process, outside the territorial judicial jurisdiction of his residence, is exempt from service of summons while in attendance on such court, or in going or returning therefrom. Bolz v. Crone, 67 P. 1108, 64 Kan. 570.

Nonresident trustee in bankruptcy, appointed in Kansas, is exempt from service of summons while within the state to sell property under order of sale issued by referee in bankruptcy. Eastern Kansas Oil Co. v. Beutner, 101 Kan. 505, 167 P. 1061.

A nonresident, while within the state to attend court as a witness and in actual attendance, is exempt from service of summons in a civil action. Gillmore v. Gillmore, 137 P. 958, 91 Kan. 293, 295, 51 L. R. A. (N. S.) 838, judgment modified on rehearing 139 P. 386, 91 Kan. 707, 51 L. R. A. (N. S.) 834.

A resident of the state while in attendance on a federal court in a county other than that of his residence as a party is exempt from service of summons in an action brought in that county. Underwood v. Fosha, 85 P. 564, 73 Kan. 408, 9 Ann. Cas. 833.

A resident of the county while in attendance on a federal court in a county other than that of his residence as a material witness, though he is not under subpœna, is exempt from service of summons in an action brought in that county. Underwood v. Fosha, 85 P. 564, 73 Kan. 408, 9 Ann. Cas. 833.

One who is in good faith attending court as a witness in a county other than that of his residence is exempt from service of summons in an action brought in that county, but if he is not a party to the litigation, and is not attending as a bona fide witness, he may be legally served with summons, and, where there is conflicting testimony as to whether he is attending court as a witness in good faith, the finding of the trial court that he did not do so is binding on him. Reiff v. Tressler, 120 P. 360, 86 Kan. 273.

[63] Commonwealth Cotton Oil Co. v. Hudson, 62 Okl. 23, 161 P. 535.

Officer of a foreign corporation, coming into state to testify in action

Where defendant went voluntarily into another county on his private business, and was not going to, returning from, or attending court under a subpœna, and was not in such county through any fraud or procurement of plaintiff, he was subject to service of summons in the county, in an action against him.[64]

Nonresident plaintiffs who voluntarily come within the jurisdiction of courts to attend the trial of a suit commenced by them against citizens of the state are not exempt from service of summons in an action by the defendants for relief connected with the suit when complete adjustment of rights of parties cannot be had in first action.[65]

A nonresident, in the state to attend the taking of depositions in a cause to which he is party, is privileged from service of process, though he transacts other business;[66] but he loses his right to exemption if he transact other business, which was the controlling motive for his presence in state, and fails to leave within a reasonable time.[67]

Division V.—Objections and Amendments

§ 502. Motion to quash—Form

To contest the service of a summons, the proper motion is to set aside the service, not to dismiss the action.[68]

wherein corporation is plaintiff, is privileged from service of summons in another action against corporation in county in which he is attending as witness, although he is not subpœnaed. Lonsdale Grain Co. v. Neil (Okl.) 175 P. 823. Exemption allowed a witness, under Rev. Laws 1910, § 5064, while actually attending court to testify, from service of summons in suit in a county in which he does not reside, extends to service of summons on him in his representative capacity as officer of a corporation. Id. Under Rev. Laws 1910, § 5064, nonresident who in good faith comes into state to testify in cause is exempt from service of summons in civil action against him, or against corporation of which he is an officer, while coming, attending, and during a reasonable time for return. Id.

[64] Clark v. Willis, 44 Okl. 303, 144 P. 587.

[65] Livengood v. Ball, 63 Okl. 93, 162 P. 768, L. R. A. 1917C, 905.

[66] Burroughs v. Cocke & Willis, 56 Okl. 627, 156 P. 196, L. R. A. 1916E, 1170.

[67] Burroughs v. Cocke & Willis, 56 Okl. 627, 156 P. 196, L. R. A. 1916E, 1170.

[68] Foster v. Markland, 14 P. 452, 37 Kan. 32.

Where an action was begun by two and summons notified defendant of a suit by a named plaintiff and others, refusal to quash service of summons because of omission of name of other parties plaintiff was not error. Kuykendall v. Lambert (Okl.) 173 P. 657.

Under Code Civ. Proc. § 701, providing that, when the sheriff is a party, the summons shall be directed to the coroner, a summons is irregular and

A summons issued before the petition is filed and service thereon should be quashed on motion.[69]

Where it is shown without contradiction that defendant was a resident of the state, an affidavit for publication service should have been quashed;[70] but a motion to quash service by publication should be overruled where plaintiff was entitled to make such service on a ground incidentally stated in the affidavit in terms not sufficiently specific as to facts.[71]

A motion to set aside a service of summons by publication on a nonresident of the state, in an action which joins claims only personal in their nature with claims affecting real estate situated in the state, will be sustained, if seasonably made.[72]

Service by publication, based upon an affidavit which contains no reference to a defendant attempted to be served, will be set aside on motion of such defendant, subsequently made.[73]

Where a person, by fraud and deceit, inveigles another into the jurisdiction of the court, for the purpose of suing him, and of obtaining service of summons upon him in that jurisdiction, the summons should be set aside.[74]

A motion to quash, because defendant was given 22 days to answer, was properly overruled.[75]

should be set aside on motion where it is directed to the sheriff but delivered to the coroner and served by him. Pelham v. Edwards, 26 P. 41, 45 Kan. 547.

In a summons issued on a writ of error the names of the parties, "Patmor" and "Rombauer," were spelled "Palmer" and "Rambauer," respectively, but the summons was correct in other respects, was duly served on the attorney of record, and the errors were caused by no fault of plaintiff in error. Held, that the service will not be set aside on a motion filed more than four months afterwards, and more than one year after the rendering of the judgment complained of, and after the time for bringing a case to the Supreme Court has elapsed. Patmor v. Rombauer, 21 P. 284, 41 Kan. 295.

Evidence as to the coming of one defendant into jurisdiction of county district court the commencement of action and service of process on him there, and subsequent service on other defendants in another county held not to show an abuse of judicial process. People's Nat. Bank of Kansas City v. Niquette, 103 Kan. 410, 493, 174 P. 581.

[69] Atchison, T. & S. F. Ry. Co. v. Lambert, 121 P. 654, 31 Okl. 300, Ann. Cas. 1913E, 329.

[70] Tolbert v. State Bank of Paden, 121 P. 212, 30 Okl. 403.

[71] Richardson v. Howard, 51 Okl. 240, 151 P. 887.

[72] Zimmerman v. Barnes, 43 P. 764, 56 Kan. 419.

[73] Rawson v. Sherwood, 53 P. 69, 59 Kan. 776.

[74] Van Horn v. Great Western Mfg. Co., 15 P. 562, 37 Kan. 523.

[75] Armstrong v. May, 55 Okl. 539, 155 P. 238.

Where full hearing is given before trial on a motion to quash the service and the motion is overruled, it is not error to refuse to reopen the issue, and submit the question to the jury.[76]

Where, upon a motion to set aside summons and service, evidence is offered, and judgment rendered "that such summons be, and the same is hereby, quashed and set aside, and declared null and void, at the costs of the plaintiff," and no objection or exception is made to the judgment, a motion for a rehearing thereof filed seven days after the adjournment of the term does not give the court jurisdiction to review such judgment;[77] but where a motion to set aside service on defendant is sustained, and a motion for rehearing is filed, the court, by continuing the hearing of that motion to the next term, may preserve jurisdiction to correct an error in its earlier ruling.[78]

MOTION TO QUASH SUMMONS AND SERVICE AND RETURN THEREOF

(Caption.)

Special Appearance and Motion to Quash Service of Summons and Return Thereof

Now comes the defendant, A. B., a corporation, and, appearing specially for the purposes of this motion only, moves the court to quash, set aside, and hold for naught the purported service of the summons and return thereof, upon this defendant, for the following reasons, to-wit:

1. Because said summons was not served and returned as required by law.

2. Because said summons was not served upon any officer or agent of this defendant, or upon any other person upon whom service of summons might be lawfully made.

———, Attorneys for Defendant.
For the Purpose of This Motion Only.

§ 503. Amendment

Errors curable by amendment include clerical errors apparent by the record;[79] a return to a summons by a deputy sheriff in his own

[76] Conrath v. Johnston, 128 P. 1088, 36 Okl. 425.

[77] Cannon v. Birney, 51 P. 298, 6 Kan. App. 188.

[78] Dye v. Denver & R. G. R. Co., 101 Kan. 666, 168 P. 1087.

[79] Summons was issued November 9, 1887. It designated the answer day to be the 9th day of December, 1887. It directed the sheriff to return it

name;[80] and the omission of the signature of the clerk from a summons otherwise regular.[81]

Officers are allowed, with liberality, to amend their returns of service of process.[82]

§ 504. —— Where service by publication

Where the jurisdictional facts exist, and the affidavit for publication is defective in the statement of matters required by statute, it is amendable, even after judgment; but where there is a total want of an allegation in the affidavit of some material matter required by statute, the service is void, and the defect cannot be cured by amendment.[83]

December 19, 1887, instead of November 19, 1887. Held, that the summons was not void, but that the error which was apparent by the record could be corrected at any time. Alford v. Hoag, 54 P. 1105, 8 Kan. App. 141.

[80] First Nat. Bank v. Ellis, 114 P. 620, 27 Okl. 699, Ann. Cas. 1912C, 687.

[81] Aultman & Taylor Machinery Co. v. Wier, 74 P. 227, 67 Kan. 674.

[82] Payne v. Long-Bell Lumber Co., 60 P. 235, 9 Okl. 683.

A sheriff will be permitted to amend his return of process so as to make it conform to the facts. Jordan v. Johnson, 42 P. 415, 1 Kan. App. 656.

Where an officer making return of service of summons inadvertently omits the date of service, the return may be amended by leave of court. Lee v. State, 47 Okl. 738, 150 P. 665.

The summons directed the sheriff to summon James M. Hendry. The return showed that he had duly served "James M. Dendry, the within-named defendant." Held, that the return could be amended, after the expiration of the sheriff's term of office, to show that he had in fact served the defendant, "James M. Hendry." Alford v. Hoag, 54 P. 1105, 8 Kan. App. 141.

[83] City Nat. Bank v. Sparks, 50 Okl. 648, 151 P. 225.

Where jurisdictional facts necessary to warrant service by publication existed at commencement of action, and the affidavit for publication was defective only in stating inferentially or otherwise any matter required by statute to be alleged therein, it is amendable. Chaplin v. First Bank of Hitchcock (Okl.) 181 P. 497; Reister v. Land, 76 P. 156, 14 Okl. 34; Hammerslough v. Hackett, 1 P. 41, 30 Kan. 57.

Where defendants contended that an amendment to a proof of publication should be refused as not in furtherance of justice, on the ground that plaintiff had agreed to notify defendants' counsel of the time when suit would be brought, but the evidence failed to show any actual promise or refusal of plaintiff to give such notice, it not being his duty to do so, held, that there was no ground for refusing the amendment. Hackett v. Lathrop, 14 P. 220, 36 Kan. 661.

An affidavit for service by publication, if voidable, may by leave of court be corrected after judgment by another affidavit showing that the requisite facts existed at the time of filing the original affidavit. Morris v. Robbins, 111 P. 470, 83 Kan. 335.

Where the affidavit to procure notice by publication, under Code Civ. Proc.

§ 505. Waiver of objections

After presentation of a motion to dismiss because plaintiff improperly named a resident of county as a defendant solely to give jurisdiction to serve movant, the real defendant, with summons in another county, it is too late to raise objection going merely to manner of service.[84]

Defendant did not waive a fatal defect in the summons by confessing judgment on an interplea of a third party after his motion to quash the summons was overruled.[85]

In trespass for abuse of legal process, subsequent irregularities in the action in which the process issued, for which the defendant was not responsible, cannot be considered to characterize the previous wrongful acts.[86]

ARTICLE III

APPEARANCE

Sections

506. For infant.
507. General appearance.
508. Special appearance.
509. Effect.
510. Waiver of process.
511. Objections—Preservation and waiver.

§ 506. For infant

An infant defendant cannot waive issuance and service of summons, nor can his guardian or any other person do so for him.[87]

§ 507. General appearance

A general appearance is entered by any plea or proceeding which raises nonjurisdictional questions involving the merits,[88] regard-

§ 74, is defective merely, the defect may be cured by amendment after publication. Weaver v. Lockwood, 43 P. 311, 2 Kan. App. 62.

See *Appearance.*

[84] Maynard v. State Bank of Lehigh, 105 Kan. 259, 182 P. 542.

[85] State v. Parks, 126 P. 242, 34 Okl. 335.

[86] Wurmser v. Stone, 40 P. 993, 1 Kan. App. 131.

[87] Iowa Land & Trust Co. v. Dawson, 134 P. 39, 37 Okl. 593.

Appearance cannot be made for an infant before service of process. Echols v. Reeburgh (Okl.) 161 P. 1065.

[88] City Nat. Bank v. Sparks, 50 Okl. 648, 151 P. 225; Walton v. Kennamer, 136 P. 584, 39 Okl. 629; Haynes v. City Nat. Bank of Lawton, 121 P. 182, 30 Okl. 614; Kaw Life Ass'n v. Lemke, 19 P. 337, 40 Kan. 142, judgment af-

less of the form of pleading as distinguished from the substance,[89] and though it be denominated a special appearance.[90]

A general appearance is entered by an objection or filing of a motion based on both jurisdictional and nonjurisdictional grounds,[91] the filing of a motion before or after judgment, based on

firmed 20 P. 512, 40 Kan. 661; Anderson v. Burchett, 30 P. 174, 48 Kan. 781; Wells v. Patton, 33 P. 15, 50 Kan. 732; Linney v. Thompson, 45 P. 456, 3 Kan. App. 718; Burnham v. Lewis, 70 P. 337, 65 Kan. 481; Burnham v. Lewis, 70 P. 337, 65 Kan. 481; Hanson v. Hanson, 122 P. 100, 86 Kan. 622.

Where defendants appeared and submitted nonjurisdictional questions which could not be determined on special appearance, they recognized court's general jurisdiction and waived all irregularities in manner in which it obtained jurisdiction of their persons. Chicago, R. I. & P. Ry. Co. v. Austin, 63 Okl. 169, 163 P. 517.

The defendant's presence and plea of not guilty gives the superior court jurisdiction of the person. Ripley v. State (Okl. Cr. App.) 190 P. 710.

Where defendants summoned personally and those summoned by publication service join in pleading or motion raising questions of law and questions of fact involved in general issue, general appearance is entered by all. Meador v. Manlove, 156 P. 731, 97 Kan. 706.

Where in a will contest after probate, the contestants invoke the court's jurisdiction on the merits, this operates as a general appearance waiving right to attack the court's jurisdiction. In re Blackfeather's Estate, 54 Okl. 1, 153 P. 839.

Where pending appeal to Supreme Court cause was transferred to district court pursuant to Laws 1913, c. 77, and Supreme Court's mandate was lodged in district court, and defendants appeared generally therein, they waived right to object to its jurisdiction, though chapter 77 was afterwards held unconstitutional. Chicago, R. I. & P. Ry. Co. v. Austin, 63 Okl. 169, 163 P. 517.

A general appearance and plea to the merits give the court jurisdiction of the person of defendant. Anglo-American Packing & Provision Co. v. Turner Casing Co., 8 P. 403, 34 Kan. 340.

[89] Lindley v. Hill, 58 Okl. 71, 158 P. 356; Hill v. Persinger, 57 Okl. 663, 157 P. 744; Edmondston v. Porter (Okl.) 162 P. 692.

Where a defendant appears in court, and moves to dissolve the attachment on the merits of the proceedings, such as the insufficiency of the attachment affidavit, he enters a general appearance in the case. Raymond v. Nix, 49 P. 1110, 5 Okl. 656.

[90] A defendant, who seeks to enter a special appearance in a cause by motion, and sets forth therein both jurisdictional and nonjurisdictional grounds for dismissal, makes a general appearance, and the fact that he called it a special appearance avails him nothing. Nichols & Shepard Co. v. Baker, 73 P. 302, 13 Okl. 1; Thompson v. Pfeiffer, 71 P. 828, 66 Kan. 368; St. Louis Cordage Mills v. Western Supply Co., 54 Okl. 757, 154 P. 646.

[91] Gorham v. Tanquerry, 48 P. 916, 58 Kan. 233; Ziska v. Avey, 122 P. 722, 36 Okl. 405.

Where a defendant appears after judgment and moves to set same aside for want of jurisdiction, and because the petition failed to state a cause of

nonjurisdictional grounds;[92] also where he moves for and procures a stay of execution after judgment,[93] the filing of a demur-

action, and the action was not a proper one for service by publication, it is a general appearance. Willett v. Blake, 39 Okl. 261, 134 P. 1109.

Defendant corporation, by attacking a default judgment rendered against it by a petition for a new trial based in part on grounds not jurisdictional, thereby enters a general appearance, which waives any defect in the service of the summons. Neosho Valley Inv. Co. v. Cornell, 56 P. 475, 60 Kan. 282.

A motion by defendant to set aside a judgment rendered against him which contains both jurisdictional and nonjurisdictional grounds constitutes a general appearance in the case. Barnett v. Holyoke Mut. Fire Ins. Co., 97 P. 962, 78 Kan. 630.

A defendant who, in making a "special appearance to set aside the service of a summons," sets up and submits nonjurisdictional matters relating to the merits, thereby waives the service of summons and submits to the jurisdiction. Frazier v. Douglass, 57 Kan. 809, 48 P. 36.

Where a nonresident defendant, defectively served with notice, makes a special appearance challenging the jurisdiction, and invites an inquiry as to the sufficiency of a pleading on a matter involving the merits, he submits himself to the jurisdiction of the court, and waives any defect in the process. Thompson v. Pfeiffer, 71 P. 828, 66 Kan. 368.

[92] By a general appearance to set aside a default judgment entered without jurisdiction of the person the judgment is validated. Welch v. Ladd, 116 P. 573, 29 Okl. 93. By a general appearance defects in service of summons are waived, though such appearance is only made on motion to vacate default judgment. Id.

By a motion to set aside a default judgment not made on jurisdictional grounds but to let in a defense on the merits defendant enters a general appearance. Welch v. Ladd, 116 P. 573, 29 Okl. 93.

A defendant, who files a motion for new trial after judgment, based on nonjurisdictional grounds, enters a general appearance. Trugeon v. Gallamore, 117 P. 797, 28 Okl. 73.

Action was tried March 12, 1906, before the United States commissioner acting as a justice of the peace. Judgment was not rendered till May 2, 1907; counsel urging him to render judgment from time to time. After its entry defendant filed an affidavit for appeal and caused the commissioner to transmit the transcript to the United States court, but failed to have the appeal docketed. November 15th it was docketed by plaintiff, and on its motion was affirmed, and judgment rendered against defendant. Held that, by appearing and filing affidavit for appeal and superseding the judgment, defendant entered appearance and could not complain of the jurisdiction of the commissioner. Farmers' Nat. Bank of Vinita v. First Nat. Bank of Pryor Creek, 103 P. 685, 24 Okl. 140.

Where on motion questions going to the jurisdiction are raised and also questions which can be raised only on a general appearance, the parties will be held to have entered the general appearance, so that defects in the service of the summons will be deemed waived, even though such appearance be made

[93] Hahn v. Steinecke, 104 Kan. 660, 180 P. 204; Woodhouse v. Nelson Land & Cattle Co., 139 P. 356, 91 Kan. 823.

after judgment and on motion to vacate the same. Rogers v. McCord Collins Mercantile Co., 91 P. 864, 19 Okl. 115.

A motion to set aside a sheriff's sale on foreclosure constitutes a personal appearance in the foreclosure suit. Jones v. Standiferd, 77 P. 271, 69 Kan. 513.

After decree entered against a defendant, based upon service by publication, he appeared, and filed a motion to redeem the land in controversy from a lien fixed upon it in the judgment. Held, that this act was, in effect, an appearance in the suit, and that the validity of the judgment could not thereafter be questioned in an action of ejectment by such defendant. Baker v. Agricultural Land Co., 61 P. 412, 62 Kan. 79.

Where defendant objected to a judgment by default being rendered on a supplemental petition, because no notice of the application for leave to file or of the filing of the supplemental petition had been given, and also because the supplemental petition did not state facts sufficient to constitute a cause of action, by challenging the sufficiency of the supplemental petition he made a general appearance to it; and, as no continuance or leave to plead was asked, the court did not err in rendering judgment. Carter v. Tallant, 32 P. 1108, 51 Kan. 516.

A motion to vacate a judgment on nonjurisdictional grounds is general appearance. Morgan v. Karcher (Okl.) 197 P. 433; First Nat. Bank of Newton v. Briggs, 50 P. 462, 6 Kan. App. 684; Lookabaugh v. Epperson, 114 P. 738, 28 Okl. 472; Kaw Life Ass'n v. Lemke, 19 P. 337, 40 Kan. 142, judgment affirmed 20 P. 512, 40 Kan. 661; Montgomery v. Wm. Cameron & Co., 49 Okl. 179, 152 P. 398; Pratt v. Pratt, 139 P. 261, 41 Okl. 577.

Where an action against a decedent was revived in the name of his administrator, and the administrator thereafter asked to have a default set aside, held, that such appearance was a waiver of any right to insist that the court had no jurisdiction in the first instance over his decedent. Moses v. Hoffmaster, 67 P. 459, 64 Kan. 142.

In an action on a note to foreclose a mortgage, the maker thereof having died, his administratrix and minor heirs were made parties and served. A decree was taken against the minors as on default. More than 12 years afterwards and 8 years after the youngest had reached majority, the heirs moved to vacate the judgment, because they had not been legally served and the petition did not state a cause of action. Held, that the last ground of the motion constituted a general appearance, and cured any defective service of summons. Barnett v. Holyoke Mut. Fire Ins. Co., 97 P. 962, 78 Kan. 630.

Where judgment was entered against defendants over whom the court did not have jurisdiction, and defendants voluntarily request the court to open the judgment under Code Civ. Proc. § 77 (Gen. St. 1901, § 4511), with permission to plead, and the request is granted and pleadings are filed and issues made are rejected, all questions are waived, and the parties are in court for all purposes. Aherne v. Wa-Keeney Land & Investment Co., 108 P. 842, 82 Kan. 435.

Where, by the court's order, one is made a party to an action, and no proper summons is served upon him, his general appearance in an action to vacate the judgment on nonjurisdictional grounds, as well as because of defects in the summons, waives all objection to the summons. Johnson Loan & Trust Co. v. Burr, 51 P. 916, 7 Kan. App. 703.

rer,[94] the giving of a redelivery bond in replevin,[95] the giving of a bond to discharge garnishment, conditioned to pay any judgment against the defendant,[96] the giving of a bond for appeal to the district court in probate proceedings,[97] a request in court for an extension of time or leave to plead or answer,[98] and an appearance to contest the right to the custody of children in a divorce suit,[99] or to contest the right to amend the affidavit in attachment,[1] or to apply for a change of venue.[2] It is also entered where the defendant files a motion to make the petition more definite and certain, joins in a stipulation that plaintiff may have time to amend, files a general denial, or files an answer to his codefendant's cross-petition.[3]

A general appearance is not entered by the mere taking of depositions not taken before the court.[4]

An unauthorized appearance for a nonresident does not give jurisdiction over him.[5] But where the attorney for the defendant in an action to quiet title enters an appearance for her without her

[94] Kauter v. Entz, 61 P. 818, 8 Kan. App. 788.

National Surety Co. v. Oklahoma Presbyterian College for Girls, 38 Okl. 429, 132 P. 652; Comp. Laws 1909, § 5632; Fitzgerald v. Foster, 69 P. 878, 11 Okl. 558; Whitaker v. Hughes, 78 P. 383, 14 Okl. 510.

[95] Fowler v. Fowler, 15 Okl. 529, 82 P. 923.

Ferguson v. McKee, 125 P. 458, 33 Okl. 332; McCord-Collins Mercantile Co. v. Dodson, 121 P. 1085, 32 Okl. 561; T. D. Turner & Co. v. Same, 121 P. 1087, 32 Okl. 566.

[96] Bishop-Babcock-Becker Co. v. Hyde, 61 Okl. 250, 161 P. 172.

[97] Where replevin is brought in the probate court, and defendant appeals to the district court on questions of law and fact, the district court then tries the case de novo and not as a court of review, and the giving of an appeal bond is an appearance waiving any question as to jurisdiction over the person of defendant. Fowler v. Fowler, 82 P. 923, 15 Okl. 529; Deming Inv. Co. v. Love, 31 Okl. 146, 120 P. 635.

[98] Anderson v. Burchett, 30 P. 174, 48 Kan. 781; Lookabaugh v. Epperson, 114 P. 738, 28 Okl. 472.

[99] Abercrombie v. Abercrombie, 67 P. 539, 64 Kan. 29.

[1] Burnham v. Lewis, 70 P. 337, 65 Kan. 481.

[2] A defendant who appears in court and applies for a change of venue, and thereafter answers to the merits of the action, and goes to trial without objection, cannot question the jurisdiction as to his person, even though a defense on that ground be included in his answer. Linney v. Thompson, 45 P. 456. 3 Kan. App. 718.

[3] Wetmore State Bank v. Courter, 155 P. 27, 97 Kan. 178.

[4] Bentz v. Eubanks, 4 P. 269, 32 Kan. 321; Bentz v. Eubanks, 4 P. 269, 32 Kan. 321.

[5] Mortgage Trust Co. of Pennsylvania v. Cowles, 45 P. 605, 3 Kan. App. 660.

consent and judgment is rendered in her favor, either she or her grantee may ratify such appearance and become entitled to the benefits of the judgment in the absence of any previous repudiation by her of the unauthorized appearance.[6]

Where an attorney is directed by his client to enter a special appearance, yet in doing so he honestly pleads matter operating as a general appearance, the client is bound thereby.[7]

An agreement to appear in an action and waive service of summons does not confer jurisdiction, as by voluntary appearance, even where it was filed at the same time as the petition.[8]

Defendants appearing by counsel, without specially limiting their appearance, to resist the granting of a temporary injunction, are in court for all purposes without the issuance of a summons.[9]

If a party to an action over which the court has obtained no jurisdiction presents himself and becomes a party to the proceeding, he thereby waives the jurisdiction, but such appearance must be in some matter before the court.[10]

Where a default judgment is rendered without summons or upon

[6] Plummer v. Ash, 133 P. 157, 90 Kan. 40.

[7] McNeal v. Gossard, 74 P. 628, 68 Kan. 113.

[8] Prescott v. Farmers' Nat. Bank, 53 P. 769, 9 Kan. App. 886.

An agreement signed by defendants 16 days prior to the filing of the petition, "We hereby consent that this case may be tried in N. county district court, and accordingly enter our appearance in this case in said N. county district court, and waive the issuance of summons," and filed with the petition, did not constitute an appearance, within the statute. Bradley, Wheeler & Co. v. Harwi, 42 P. 411, 2 Kan. App. 272.

[9] Arment v. Dodge City, 154 P. 219, 97 Kan. 94.

[10] Hentig v. Redden, 16 P. 820, 38 Kan. 496.

After the issues were joined in an action on a foreign judgment, defendant died, and plaintiff presented his claim to his executors who rejected the same. The court allowed plaintiff to amend his petition, and gave defendants 30 days in which to answer. The petition set up the death of the defendant, the appointment of the executors, and the presentation and rejection of the claim. The executors filed a general appearance. Held, that such appearance was a submission to jurisdiction and waived a formal revivor. Brown v. Hillman, 116 P. 775, 29 Okl. 205.

Where defendant enters a general appearance in the case without first attacking the service by publication, on the ground of the defect in the affidavit for publication, he waives such defect. Raymond v. Nix, 49 P. 1110, 5 Okl. 656.

The voluntary general appearance of the defendant is equivalent to the personal service of summons, and where it has been made by a nonresident defendant it is error to enter an ex parte order permitting him to withdraw

fatally defective process, defendant, during that term, may appear by motion and have the judgment vacated on that ground, and that the motion contains matters constituting a general appearance does not render order vacating the judgment erroneous.[11]

Filing a suit constitutes submission to the jurisdiction for all purposes within the petition.[12]

§ 508. Special appearance

Any plea or proceeding which raises jurisdictional questions only is a special appearance,[13] and will not give the court jurisdiction over defendant's person.[14]

An appearance to be special must be shown to be such by proper designation.[15]

Where a court has no jurisdiction and the defendant appears specially to call attention to such irregularity and the court overrules his motion to such jurisdiction, he may save his exception, file his answer, and proceed to trial without waiving such error; and he

his appearance. Insurance Trust & Agency v. Failing, 71 P. 826, 66 Kan. 336; Same v. Green, Id.

A voluntary appearance, so as to be equivalent to a service of summons, is made by defendant signing a paper, entitled in the cause, waiving service of summons and entering an appearance in the action, whether the same is filed with the petition or afterwards, or in term time or vacation. Judgment 53 P. 769, 9 Kan. App. 886, reversed. Salina Nat. Bank v. Prescott, 57 P. 121, 60 Kan. 490.

[11] Fried v. First Nat. Bank (Okl.) 176 P. 909.

[12] Humphreys v. Smith (Okl.) 197 P. 155.

[13] City Nat. Bank v. Sparks, 50 Okl. 648, 151 P. 225.

A motion to set aside an order confiscating property held not a "general appearance." Bishop v. Fischer, 145 P. 890, 94 Kan. 105, Ann. Cas. 1917B, 450.

A defendant who appears specially, and moves to dismiss an action against him on jurisdictional grounds, does not thereby enter a general appearance in the case. Thompson v. Greer, 64 P. 48, 62 Kan. 522.

Where defendants merely move to dismiss the action on the ground that the court has no jurisdiction of them, because there has been no service of summons, and limit their appearance to the purpose of the motion, the appearance is special, and gives the court no jurisdiction of the persons of defendants. Anglo-American Packing & Provision Co. v. Turner Casing Co., 8 P. 403, 34 Kan. 340.

By moving to set aside a judgment on the ground that no proper service was had on defendant, the latter makes a special appearance only. Green v. Green, 22 P. 730, 42 Kan. 654, 16 Am. St. Rep. 510.

For form, see Motion to Quash, ante, § 502.

[14] City Nat. Bank v. Sparks, 50 Okl. 648, 151 P. 225.

Green v. Green, 22 P. 730, 42 Kan. 654, 16 Am. St. Rep. 510.

[15] Drennan v. Warburton, 122 P. 179, 33 Okl. 561.

may take advantage of such error on appeal;[16] but, where he files a cross-petition and asks for affirmative relief, he submits his person to the jurisdiction of the court for all purposes of the entire action.[17]

When a defendant files a plea in the nature of a plea in abatement, which questions the jurisdiction of the court over the person of the defendant, and such defendant, without requesting or obtaining a ruling upon such plea, voluntarily obtains leave of court, and files his answer to the merits of the case, the filing of such answer waives the special plea to jurisdiction, and amounts to a general appearance in the case for all purposes.[18]

A judgment having been entered against one of several defendants, who had not been served, and had not entered an appearance, a motion by him to modify and vacate the judgment as against him will not render the judgment valid as to him, though, in addition to stating that the court had acquired no jurisdiction of his person, the motion recites that the judgment was entered as it was by mistake and inadvertence, and that the judgment actually rendered by the court did not affect the party moving for a modification of the entry.[19]

§ 509. Effect

A general appearance by giving a bond to discharge a garnishment converts the action from one in rem to one in personam.[20]

In a creditor's action against the state bank examiner, an appear-

[16] Chicago Bldg. & Mfg. Co. v. Pewthers, 63 P. 964, 10 Okl. 724; Same v. Kirby, 63 P. 966, 10 Okl. 730; Jones v. Chicago Bldg. & Mfg. Co., 64 P. 7, 10 Okl. 628; Mortgage Trust Co. of Pennsylvania v. Norris, 54 P. 283, 8 Kan. App. 699; St. Louis & S. F. R. Co. v. Clark, 87 P. 430, 17 Okl. 562.

[17] F. C. Austin Mfg. Co. v. Hunter, 86 P. 293, 16 Okl. 86; Thompson v. Greer, 64 P. 48, 62 Kan. 522.

Where the attorney for a railroad company takes part in the trial of a case in which it is defended under protest, after his motion to quash the summons has been overruled, he having made a special appearance to test the validity of the service, there is no such appearance as will give the court jurisdiction of the person of defendant if the service is in fact invalid. Dickerson v. Burlington & M. R. R. Co., 23 P. 936, 43 Kan. 702.

[18] Winfield Nat. Bank v. McWilliams, 60 P. 229, 9 Okl. 493.

[19] First Nat. Bank of Newton v. Wm. B. Grimes Dry-Goods Co., 26 P. 56, 45 Kan. 510.

[20] Bishop-Babcock-Becker Co. v. Hyde, 61 Okl. 250, 161 P. 172.

ance by the commissioner to defend the suit did not make the state a party consenting to the action.[21]

The application of the trustees under the will of a deceased person to be let in to defend will not render effective for any purpose a void judgment against such person rendered after his death.[22]

§ 510. —— Waiver of process

A general appearance waives all defects in the summons and confers jurisdiction for all purposes.[23]

No summons need be issued where a voluntary general appearance is entered.[24] Hence, where a motion to quash service of summons is overruled and not excepted to, and upon application movant files his answer, service of summons is waived and movant is properly in court.[25] Likewise, where no summons was issued by defendant on the filing of its motion to set aside the judgment, plaintiff's appearance at the hearing and his participation therein operated as a waiver of the issuance and service of summons.[26]

§ 511. Objections—Preservation and waiver

Where a defendant appears specially and objects to the jurisdiction, he may, when his motion is denied, file his answer without making a general appearance, unless in his answer he asks for affirmative relief, in which case his appearance is general.[27]

[21] Lankford v. Schroeder, 47 Okl. 279, 147 P. 1049.

[22] Morris v. Winderlin, 142 P. 944, 92 Kan. 935.

[23] Hanson v. Hanson, 122 P. 100, 86 Kan. 622; Ziska v. Avey, 122 P. 722, 36 Okl. 405; Turk v. Mayberry, 121 P. 665, 32 Okl. 66.

Where after judgment against a grantee on the warranty, and over against her grantor, the grantor moved for a new trial, he thereby entered a general appearance and validated the judgment regardless of any defect in the proof of service of the notice to warrantor prescribed by Comp. Laws 1909, § 1205, and in the absence of service of summons on him. Clarkson v. Washington, 38 Okl. 4, 131 P. 935.

Where a defendant appears after judgment and moves to set same aside for want of jurisdiction, and because the petition failed to state a cause of action, and the action was not a proper one for service by publication, it is a waiver of his right to question the court's jurisdiction to render the judgment. Willett v. Blake, 39 Okl. 261, 134 P. 1109.

Guardian cited to show cause why he should not be discharged by entering general appearance waives all defects in citation. In re Byrd, 122 P. 516, 31 Okl. 549.

[24] Wetmore State Bank v. Courter, 155 P. 27, 97 Kan. 178.

[25] Tracy v. State, 60 Okl. 109, 159 P. 496.

[26] Continental Gin Co. v. Arnold (Okl.) 167 P. 613, L. R. A. 1918B, 511.

[27] Shufeldt v. Jefcoat, 50 Okl. 790, 151 P. 595; Vann v. Missouri, K. & T.

Where defendant appears specially to challenge the court's jurisdiction over the person and saves exceptions to an adverse ruling, he may file his answer and proceed to trial without waiving such error.[28]

Where an objection to service by publication in a case begun by garnishment is properly overruled, jurisdiction to render a personal judgment against the defendant, after trial on the merits, is conferred by his answer, notwithstanding right to review a ruling on objection was preserved.[29]

Any plea or proceeding which raises nonjurisdictional questions involving the merits waives all questions as to regularity of the service,[30] but does not waive any irregularities in the proceedings and judgment which may deprive them of a substantial right.[31]

In action by a Seminole freedman to quiet title to her allotted lands, where, on suggestion of her death, the court, without notice to defendants, revived the action in the name of her father, enrolled as a Creek, who filed supplemental pleadings, the irregularity in making the order of revival was waived by defendants' general appearance.[32]

Ry. Co. (Kan.) 176 P. 652; Bes Line Const. Co. v. Schmidt, 85 P. 711, 16 Okl. 429; Bes Line Const. Co. v. Taylor, 85 P. 713, 16 Okl. 481.

Where defendant, after the overruling of his objections to jurisdiction, voluntarily demands affirmative relief, he waives his objection. Wm. Cameron & Co. v. Consolidated School Dist. No. 1 of Kiowa County, 44 Okl. 67, 143 P. 182.

Filing of answer claiming damages after overruling of special appearance held a general appearance waiving any error in overruling a special appearance. Hamra v. Fitzpatrick, 55 Okl. 780, 154 P. 665.

Where a nonresident defendant in attachment, after denial of his motion to discharge the attachment, answered and filed cross-action, it thereby entered a general appearance and waived its objection to the court's jurisdiction. Southwestern Broom & Warehouse Co. v. City Nat. Bank, 52 Okl. 422, 153 P. 204.

Where defendant, after denial of motion to quash service, answered and asked for affirmative relief, he waived any defect in the service of publication. Oates v. Freeman, 57 Okl. 449, 157 P. 74; Hill v. Persinger, 57 Okl. 663, 157 P. 744.

[28] St. Louis & S. F. R. Co. v. Reed, 59 Okl. 95, 158 P. 399.

[29] Dye v. Denver & R. G. R. Co., 101 Kan. 666, 168 P. 1087.

[30] City Nat. Bank v. Sparks, 50 Okl. 648, 151 P. 225; Valley Abstract Co. v. Page, 141 P. 416, 42 Okl. 365.

[31] Griffin v. Jones, 45 Okl. 305, 147 P. 1024.

[32] Dickinson v. Abb (Okl.) 176 P. 523.

CHAPTER X

CONTINUANCE AND DISMISSAL

Sections
512–526. Article I.—Continuance.
527–539. Article II.—Dismissal.

ARTICLE I

CONTINUANCE

Sections
512. When granted—Discretion.
513. Stipulation.
514. Grounds—Illness of party.
515. Accident or mistake.
516. Amendment of pleading.
517. Absence of counsel.
518. Depositions.
519. Absence of witness.
520. Surprise at trial.
521. Admissions to prevent continuance.
522. Offer to confess judgment.
523. Application and affidavit—Forms.
524. Time of making.
525. Further continuances.
526. Objections—Waiver.

§ 512. When granted—Discretion

"The court may, for good cause shown, continue an action at any stage of the proceedings upon such terms as may be just; provided, that, if a party, or his attorney of record, is serving as a member of the Legislature, or of the Senate, sitting as a court of impeachment, or within ten days after an adjournment of a session of the Legislature, such fact shall constitute cause for continuance, the refusal to grant which shall constitute error, and entitle such party to a new trial as a matter of right. When a continuance is granted on account of the absence of evidence it shall be at the cost of the party making the application unless the court otherwise order." [1]

[1] Sess. Laws 1915, p. 556, § 1, amending Rev. Laws 1910, § 5044, effective March 22, 1915; McMahan v. Norick, 69 P. 1047, 12 Okl. 125.

For additional grounds for continuance, where a litigant or his attorney is

The granting or refusal of a motion for a continuance is addressed to the trial judge's sound discretion,[2] and a continuance should be granted only when clearly in furtherance of justice.[3]

Where facts and circumstances tend to cast doubt as to the truth of matters averred in affidavits supporting a motion for a continuance, or to raise a judicial suspicion that the motion was made for mere delay and to hinder the administration of justice, there is no abuse of discretion in denying the continuance.[4]

The act of a trial judge in stating to counsel off the bench and before a motion for a continuance has been presented that the motion would be overruled, while not commendable, is not sufficient to show an abuse of discretion in overruling the motion.[5]

§ 513. Stipulation

Plaintiff's motion for a continuance founded upon an alleged oral agreement of counsel made out of court, but denied by defendant's counsel, is properly refused, the court not being bound by such agreements, especially where counsel differ as to what the agreement actually was.[6] Where there was an agreement between counsel that the testimony of certain witnesses in another case should be transcribed and used as a deposition in the present case, and the party in whose favor the testimony was given relied on the agreement and did not procure the attendance of the witnesses, such testimony should have been admitted, though objected to, or a continuance should have been granted.[7]

a member of the Legislature, see Sess. Laws 1919, p. 374, amending Sess. Laws 1915, c. 236, § 1.

[2] Scott v. Iman (Okl.) 176 P. 81; Columbian Nat. Life Ins. Co. v. Wirthle (Okl.) 176 P. 406; Priest v. Quinton (Okl.) 171 P. 1113; Walton v. Kennamer, 136 P. 584, 39 Okl. 629; Fire Ass'n of Philadelphia v. Farmers' Gin Co., 39 Okl. 162, 134 P. 443.

[3] Jennings Co. v. Dyer, 139 P. 250, 41 Okl. 468.

[4] Economy Hog & Cattle Powder Co. v. Bilby, 104 Kan. 769, 180 P. 735.

It is not error to refuse to continue a case on defendant's request, in the absence of any showing that he could not be ready for trial. Clark v. Ellithorpe, 51 P. 940, 7 Kan. App. 337.

[5] Crutchfield v. Martin, 117 P. 194, 27 Okl. 764.

[6] Clark v. Dekker, 23 P. 956, 43 Kan. 692.

[7] Cherokee & P. Coal & Mining Co. v. Wilson, 28 P. 178, 47 Kan. 460.

STIPULATION FOR CONTINUANCE

(Caption.)

It is hereby stipulated and agreed by and between the parties to this action that this cause may be continued (at the cost of ———), to the ——— term of this court, subject to the approval of the court.

G. H., Attorney for Plaintiff.
X. Y., Attorney for Defendant.

§ 514. Grounds—Illness of party

"A motion for a continuance, on account of the absence of evidence, can be made only upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it, and where the evidence may be; and if it is for an absent witness, the affidavit must show where the witness resides, if his residence is known to the party, and the probability of procuring his testimony within a reasonable time, and what facts he believes the witness will prove, and that he believes them to be true. If thereupon, the adverse party will consent that on the trial the facts alleged in the affidavit shall be read and treated as the deposition of the absent witness, or that the facts in relation to other evidence shall be taken as proved to the extent alleged in the affidavit, no continuance shall be granted on the ground of the absence of such evidence." [8]

It was not error to refuse a continuance on the ground of defendant's sickness, which had already lasted a year, without a showing of probability that he could attend court within a reasonable time; [9] nor was it error to refuse a continuance asked by one of two defendants sued as co-partners, where the only showing was that defendant, who was a nonresident of the state, desired to attend the trial, but was unable to do so on account of sickness.[10]

Where an application for a continuance on the ground that the applicant is prevented from attending on account of his sickness is supported only by the certificate of a physician, and no affidavit is filed by the physician, or any other person having personal knowl-

[8] Rev. Laws 1910, § 5045; Martin v. Hubbard, 121 P. 620, 32 Okl. 2.
That the president of a corporation plaintiff was sick was not ground for a continuance. Jennings Co. v. Dyer, 139 P. 250, 41 Okl. 468.
[9] Cohn v. Clark, 48 Okl. 500, 150 P. 467, L. R. A. 1916B, 686.
[10] Paulucci v. Verity, 40 P. 927, 1 Kan. App. 121.

edge that the party is unable to attend court, the ruling of the court refusing a continuance will not be reversed;[11] but where an application for a continuance is made on the ground of an absence of a party to the action, and it is shown by the affidavit of a physician that she is unable to attend on account of serious sickness, and the attorney for the party makes an affidavit showing that she is a material witness, and that her presence at the trial is necessary, it was an abuse of discretion to deny the application for a continuance.[12]

§ 515. Accident or mistake

The denial of a continuance sought because of the absence of plaintiff, who was an important witness, was an abuse of discretion, where his absence was due to being informed by his counsel that the case would be dismissed on his motion, which motion was denied.[13]

A motion by plaintiff for a continuance when the case was called for trial in her absence should have been granted on a showing that plaintiff intended to be present, and that a failure to attend was due to the miscarriage of a letter written by her attorney.[14]

§ 516. Amendment of pleading

"When either party shall amend any pleading or proceeding, and the court shall be satisfied, by affidavit or otherwise, that the adverse party could not be ready for trial, in consequence thereof, a continuance may be granted to some day in term, or to another term of the court." [15]

[11] Harlow v. Warren, 17 P. 159, 38 Kan. 480.

A postponement of a trial on account of the absence of defendant, who, it was alleged, was unable to attend by reason of personal injuries, was asked for by his counsel. In the affidavit for continuance the inability of defendant to attend was shown, and it was stated that no defense could be made without his personal attendance. There had been a previous trial, and it was not shown that defendant had a bona fide defense, or that he was a witness to any material fact, or possessed of any knowledge not shared by his counsel. Held, that the overruling of the motion was not such an abuse of discretion as to justify a reversal. Beard v. Mackey, 32 P. 921, 51 Kan. 131.

Evidence held to justify court's decision that the defendant's sickness, made the ground of an application for a continuance, was only feigned, and that the application was merely to hinder the administration of justice. Ladd v. Flato, 102 Kan. 312, 169 P. 958.

[12] McMahan v. Norick, 69 P. 1047, 12 Okl. 125.

[13] Cox v. Kirkwood, 139 P. 980, 41 Okl. 704.

[14] Helm v. Voils, 49 P. 662, 58 Kan. 816.

[15] Rev. Laws 1910, § 4793.

Where the issues are closed for ten days before the case is set for trial by the filing of a pleading or by the lapse of time by failure to plead, the statute ceases to operate, and the subsequent filing of amended pleadings not changing the issues or prejudicing the complaining party will not necessarily work a delay of the trial.[16]

A cause may not be delayed by reason of an amendment except on good cause shown by the affidavit of the party asking the delay showing distinctly in what respect he has been prejudiced by the amendment.[17]

A continuance on account of a formal amendment of the petition is not a matter of right.[18]

The denial of a continuance sought because of an amendment to the petition is not error, in the absence of a showing of surprise,[19] or the need of unanticipated testimony to meet a new question.[20]

Surprise is not sufficient ground for a continuance, unless the surprise is such as cannot be obviated by the exercise of ordinary care and due diligence on the part of the party asking for the continuance.[21]

Where an amended petition was filed by leave of court, setting up additional claims for relief against defendants who had not answered the original petition, it was error to refuse to continue as to said defendants for additional service, and to dismiss said action as to them, since the plaintiff was entitled to additional time in which to notify such defendants of the additional allegations against them.[22]

[16] Harn v. Missouri State Life Ins. Co. (Okl.) 173 P. 214; Rev. Laws, 1910, § 5043.

[17] Diebold Safe & Lock Co. v. Holt, 46 P. 512, 4 Okl. 479.

[18] Union Pac. Ry. Co. v. Motzner, 55 P. 670, 8 Kan. App. 431; State Bank of Downs v. Abbott, 104 Kan. 344, 179 P. 326; Thompson v. Aultman & Taylor Mach. Co., 146 P. 1188, 94 Kan. 453.

[19] Lewis v. Bandy, 45 Okl. 45, 144 P. 624; Parsons Water Co. v. Hill, 26 P. 412, 46 Kan. 145.

[20] Chandler v. Parker, 70 P. 368, 65 Kan. 860.

Where the plaintiff sues on various items of account and damage, and the defendant answers, admitting some of the claims, and denying others, and setting up various items of counterclaim, to which plaintiff replies with a general denial, and the parties go to trial, and, after the plaintiff has rested, the defendant is allowed to file an amendment setting up an entirely new item of counterclaim, the plaintiff should be allowed time to plead to said amendment, or to procure evidence thereon. Vale v. Trader, 48 P. 458, 5 Kan. App. 307.

[21] Missouri, K. & T. Ry. Co. v. Horton, 119 P. 233, 28 Okl. 815.

[22] Woodruff v. Albright, 62 P. 250, 10 Kan. App. 113.

§ 517. Absence of counsel

Absence of counsel is not a statutory ground for a continuance, and the grant or refusal of a continuance therefor is within the discretion of the court.[23]

§ 518. Depositions

On objection to depositions because not filed one day before trial, the court on its own motion may continue the cause.[24]

Where depositions are suppressed because when received through the mail, the envelope inclosing them was found torn open, it is error to refuse a continuance; it appearing that the defective condition in which the depositions were received was not caused by any neglect of the party taking the same.[25]

§ 519. Absence of witness

The continuance of a case for the absence of a witness is in the discretion of the trial court.[26]

After a case has been called for trial, and both parties have announced themselves ready, and evidence has been introduced, an application for a continuance to send to another county to procure a witness is properly denied.[27]

It is proper to overrule an application for a continuance which

[23] Pool v. Riegal, 46 Okl. 5, 147 P. 1193. Denial of a continuance, sought for absence of counsel, held not error, where the motion was unverified, and did not show that the absent counsel was the sole counsel, or the facts as to his absence, or effort made to procure other counsel. Id.

Defendants' application for a continuance on the ground that one of their attorneys was a member of the Legislature and could not be present at the trial because the Legislature was in session was properly denied. Berry v. Dewey, 172 P. 27, 102 Kan. 593.

Denial of motion for continuance, on ground of absence of counsel by reason of illness, held not an abuse of the trial court's discretion, where party was represented by two able lawyers present. Snyder Co-op. Ass'n v. Brown (Okl.) 172 P. 789.

[24] Kepley v. Dingman, 130 P. 284, 36 Okl. 771.

[25] Order of United Commercial Travelers of America v. Barnes, 82 P. 1099, 72 Kan. 293, 7 Ann. Cas. 809, affirming judgment 80 Pac. 1020.

[26] Missouri Pac. Ry. Co. v. Haynes, 42 P. 259, 1 Kan. App. 586.

A motion for a continuance, after the beginning of the trial, to procure witnesses to support movant's credibility, is addressed to the discretion of the court. McCann v. McCann, 103 P. 694, 24 Okl. 264.

[27] Butt v. Carson, 48 P. 182, 5 Okl. 160.

does not show that diligence has been exercised in endeavoring to procure the absent witnesses.[28]

It is not an abuse of discretion to deny a continuance for the absence of a witness whose deposition the applicant has not attempted to procure, though the witness was not amenable to or served with a subpœna but promised to appear and testify.[29]

A motion for continuance for absent witnesses is properly overruled, where the proposed testimony shown is immaterial to the issues.[30]

There was no abuse of discretion in refusing an application of a corporation defendant for a continuance to procure attendance of its president, who had absented himself with knowledge that the case had been set for trial.[31]

§ 520. Surprise at trial

Denial of a continuance on the ground of surprise from a statement by plaintiff's counsel in examining jurors, which statement was claimed to disclose ground for removal to the federal court, was not error where plaintiff's attorney expressly denied the existence of any such ground, and the undisputed evidence showed that no such ground existed.[32]

Where on the trial of a civil action, one party introduces evidence tending to impeach the character for veracity of the other party,

[28] Swope v. Burnham, 52 P. 924, 6 Okl. 736; Terrapin v. Barker, 109 P. 931, 26 Okl. 93; Standifer v. Sullivan, 30 Okl. 365, 120 P. 624; Berry v. Dewey, 102 Kan. 392, 170 P. 1000; King v. King, 141 P. 788, 42 Okl. 405; Missouri, O. & G. Ry. Co. v. Vandivere, 141 P. 799, 42 Okl. 427; Clark v. Dekker, 23 P. 956, 43 Kan. 692.

Where a sale was made on May 7th, and a motion to set it aside was filed October 1st, a continuance to allow the person making the motion to procure testimony was properly denied. McDonald v. Citizens' Nat. Bank of Concordia, 51 P. 289, 58 Kan. 818.

[29] Wood v. French, 136 P. 734, 39 Okl. 685.

There was no error in refusing an application for a continuance because of the absence of a witness living in another county, who, the application showed, was sick and unable to attend, where no effort had been made to procure the deposition of this witness until four days before the trial, and after the case was assigned for trial. Gill v. Buckingham, 52 P. 897, 7 Kan. App. 227.

[30] Standifer v. Sullivan, 30 Okl. 365, 120 P. 624; Title Guaranty & Surety Co. v. Slinker, 128 P. 696, 35 Okl. 128; Id., 128 P. 698, 35 Okl. 153.

[31] Garner v. Dodge City Wholesale Grocery Co., 102 Kan. 5, 169 P. 219.

[32] St. Louis & S. F. R. Co. v. Long, 137 P. 1156, 41 Okl. 177, Ann. Cas. 1915C, 432.

and the party sought to be impeached thereupon requests, and the court allows, a delay in the trial to enable the impeached party to obtain witnesses in rebuttal of such impeachment, and thereupon the other party, to save time, withdraws the impeaching evidence, and the court orally instructs the jury to disregard such evidence, it is not error for the court to revoke the order for delay and to at once proceed with the trial.[33]

§ 521. Admissions to prevent continuance

Where a party opposing a continuance asked for on ground of the absence of a material witness admits that the witness, if present, would testify as stated in the moving affidavit, the trial court commits no error in refusing the continuance.[34]

Where the defendant's depositions were quashed, and he moved for a continuance, and filed an affidavit of diligence, and made the depositions which had been quashed a part of his affidavit, and plaintiff elected to go to trial and to admit the affidavit, the depositions were as much a part of the affidavit as though they had been copied on the paper containing the balance of the affidavit.[35]

A party who agreed that statements contained in an application for a continuance could be read as the deposition of an absent witness, was not entitled to impeach such testimony by showing prior statements of the witness.[36]

§ 522. Offer to confess judgment

The making of an offer to confess judgment shall not be a cause for a continuance of an action or a postponement of the trial.[37]

§ 523. Application and affidavit—Forms

"A motion for a continuance, on account of the absence of evidence, can be made only upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it, and where the evidence may be; and if it is

[33] Gulliford v. McQuillen, 89 P. 927, 75 Kan. 454.

[34] Chandler v. Colcord, 32 P. 330, 1 Okl. 260.

See Rev. Laws 1910, § 5045, post, § 523; Sanford v. Gates, 16 P. 807, 38 Kan. 405.

[35] Bell v. Lloyd, 74 P. 242, 67 Kan. 859.

[36] National Council, Knights and Ladies of Security, v. Owen, 47 Okl. 464, 149 P. 231.

[37] Rev. Laws 1910, § 5302.

for an absent witness, the affidavit must show where the witness resides, if his residence is known to the party, and the probability of procuring his testimony within a reasonable time, and what facts he believes the witness will prove, and that he believes them to be true. If thereupon, the adverse party will consent that on the trial the facts alleged in the affidavit shall be read and treated as the deposition of the absent witness, or that the facts in relation to other evidence shall be taken as proved to the extent alleged in the affidavit, no continuance shall be granted on the ground of the absence of such evidence." [38]

[38] Rev. Laws 1910, § 5045.

Diligence.—An application for a continuance for newly discovered evidence must show due diligence and that there is a probability of procuring the testimony of the witnesses within a reasonable time. Murphy v. Hood & Lumley, 73 P. 261, 12 Okl. 593; Crutchfield v. Martin, 117 P. 194, 27 Okl. 764; Fisher v. State (Okl. Cr. App.) 196 P. 724; Board of Regents of Kansas State Agricultural College v. Linscott, 1 P. 81, 30 Kan. 240; Kilmer v. St. Louis, Ft. S. & W. R. Co., 14 P. 465, 37 Kan. 84.

Statement of facts.—Where a continuance is sought because of an absent witness, the applicant must clearly show in the application where the witness resides, if he knows, the probability of procuring his testimony within a reasonable time, and that the facts affiant believes he will prove are true. St. Louis & S. F. R. Co. v. Cox, 109 P. 511, 26 Okl. 331; Terrapin v. Barker, 109 P. 931, 26 Okl. 93; Clouston v. Gray, 28 P. 983, 48 Kan. 31.

Materiality.—Affidavit on motion for continuance to procure additional evidence to rebut plaintiff's evidence, containing no statement of any material evidence which movant would have offered in view of movant's failure to introduce alleged evidence at the argument after a postponement, did not authorize a continuance. Columbian Nat. Life Ins. Co. v. Wirthle (Okl.) 176 P. 406; Terrapin v. Barker, 109 P. 931; 26 Okl. 93; Chas. T. Derr Const. Co. v. Gelruth, 120 P. 253, 29 Okl. 538.

Belief of facts.—He must show that he believes to be true the material facts which he believes the witness would prove. Wood v. French, 136 P. 734, 39 Okl. 685.

Probability of procuring evidence.—The affidavit for continuance for the absence of material witnesses should contain a statement of the facts showing the probability of procuring the evidence of such witnesses. Creek Coal Mining Co. v. Paprotta (Okl.) 175 P. 235; Fisher v. State (Okl. Cr. App.) 196 P. 724.

Verification.—The denial of a continuance on the ground that applicant desired to attend the trial as a witness, but was prevented by sickness in his family, was not error, where no one with knowledge of sickness swore to either certificate or application. Berry v. Dewey, 172 P. 27, 102 Kan. 593.

MOTION FOR CONTINUANCE

(Caption.)

Comes now the plaintiff, A. B., and moves the court to grant him a continuance of the above-entitled cause until the next term of this court, for the reason that (set out reasons).

And in support of this motion, the affidavit of ——— is attached hereto, marked Exhibit A, and made a part hereof.

X. Y., Attorney for Plaintiff.

(Attach affidavits.)

AFFIDAVIT FOR CONTINUANCE

(Caption.)

State of Oklahoma, }
County of ———. } ss.:

A. B., being first duly sworn, upon oath says:

That he is the plaintiff in this action; that C. D. is a material witness for this plaintiff, without the benefit of whose testimony deponent cannot safely proceed to the trial of said action; that said witness is absent; that he has been duly subpœnaed; that he resides in the county where the above case is pending; that his testimony is material; that such witness is not absent by the permission, directly or indirectly, of this applicant; that he expects that he will be able to procure the testimony of such witness at the next term of this court; that this application for a continuance is not made for the purpose of delay, but to enable him to procure the testimony of such absent witness; that there is no other witness by whom he can prove the same facts; that deponent expects to prove by said absent witness the following facts: (Stating same.) (Set forth any other material facts as to cause of absence of witness, etc.)

———.

Subscribed and sworn to before me this ——— day of ———, 19—. (Jurat.)

JOURNAL ENTRY OF ORDER GRANTING CONTINUANCE

(Caption.)

Now on this ——— day of ———, 19—, this cause comes on for hearing on the motion of plaintiff for a continuance of the above-entitled cause until the next term of this court, said cause having

been heretofore regularly set for trial on this date, the plaintiff appearing by his attorney X. Y., and the defendant appearing by his attorney, G. H., and the court, upon consideration of said motion and affidavits presented in support thereof and oral testimony heard, and being fully advised in the premises, finds that said plaintiff would be prevented from having a fair and impartial trial on account of the absence of material evidence which he has used due diligence to obtain, and that it is probable that said evidence may be produced by plaintiff at the next term of this court; and the said defendant, having refused to consent that on the trial the facts alleged in the affidavit of plaintiff for a continuance might be read and treated as the deposition of the absent witness.

It is therefore by the court ordered that this cause be and the same is hereby continued to the next term of this court, and that the costs of such continuance shall be taxed against said plaintiff.

———, Judge.

§ 524. Time of making

An application for continuance should be made without delay.[39]

Where, by a rule of court, a party desiring the continuance of a cause is required to make his application therefor on the first day of the term, or show cause why he has not done so, it is not error for the court to overrule such an application made during the term, if no such showing is made.[40]

§ 525. Further continuances

The denial of a continuance was not an abuse of discretion, where the cause had been continued three times on practically the same grounds and it did not appear that a further continuance would be to any advantage.[41]

§ 526. Objections—Waiver

By withdrawing his answer and demurring to the petition and electing to stand on his demurrer after the overruling thereof,

[39] In an action by an administrator, there was no abuse of discretion in refusing a postponement of the trial, in order that defendant might have a hearing upon his application to revoke the letters of administration; the application not having been filed in the probate court until the day of the trial, although the suit had been pending for nearly six months. Livermore v. Ayres, 119 P. 549, 86 Kan. 50.

[40] Lesh v. Meyer, 66 P. 245, 63 Kan. 524.

[41] Weems v. Melton, 47 Okl. 706, 150 P. 720.

a defendant waives the error in overruling his previous application for a continuance on account of the absence of witnesses.[42]

ARTICLE II

DISMISSAL

Sections

527. Dismissal without prejudice.
528. Right—Discretion.
529. Involuntary—Discretion—Grounds.
530. Process—Pleadings—Non-compliance with order.
531. Continuance.
532. Want of prosecution.
533. Forms—Motion to dismiss—Order.
534. Reinstatement.
535. Dismissal without order of court.
536. Parties.
537. Dismissal as to part of defendants.
538. Trial of counterclaim after dismissal.
539. Jurisdiction subsequent.

§ 527. Dismissal without prejudice

"An action may be dismissed, without prejudice to a future action:

"First. By the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court.

"Second. By the court, where the plaintiff fails to appear on the trial.

"Third. By the court, for the want of necessary parties.

"Fourth. By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence.

"Fifth. By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action.

"Sixth. In all other cases, upon the trial of the action, the decision must be upon the merits." [43]

[42] Day v. Mooney, 41 P. 142, 3 Okl. 608.

[43] Rev. Laws 1910, § 5125.

Dismissal of action under Rev. Laws 1910, § 5125, is judgment, and requires order of court. Mullen v. Noah, 64 Okl. 181, 166 P. 742. Authority given plaintiff by Rev. Laws 1910, § 5126, to dismiss without order of court does not deprive court of power to inquire into means by which motion was obtained. Id.

Gen. St. 1897, c. 95, § 393, provides that plaintiff may dismiss his action

§ 528. —— Right—Discretion

The right of the plaintiff to dismiss his action without prejudice at any time before the final submission of the same is absolute.[44] But, where the plaintiff has submitted his case by introducing evidence and filing a written brief, and the court has taken the case under advisement and has considered the merits, the plaintiff cannot as a matter of right dismiss his action without prejudice.[45]

Where the evidence is closed, the jury have returned their findings, and the case is ready for judgment, there is a "final submission" of the case.[46]

After the trial court sustains a demurrer to the plaintiff's evidence, it is within its discretion to set aside such order and allow the cause to be dismissed by the plaintiff without prejudice.[47]

§ 529. Involuntary—Discretion—Grounds

Whether it is an abuse of discretion to refuse to continue an action and to dismiss the case for want of prosecution and to refuse to

without prejudice before the final submission of the case to the jury or to the court, where the trial is by the court. In actions to set aside a will, a jury acts merely for the purpose of advising the court, which may refuse to accept their findings. In such an action, the court submitted to the jury certain particular questions of fact, which covered part of the issues of the case. After the jury had answered the questions, plaintiff asked leave to dismiss the action without prejudice, which was denied. Thereupon the court proceeded, after the jury was discharged, to hear testimony on another issue not passed on by the jury. Held, that it was error to refuse to permit a dismissal. Osborne v. Davies, 57 P. 941, 60 Kan. 695.

[44] New Hampshire Banking Co. v. Ball, 48 P. 137, 57 Kan. 812.

Under Rev. Laws 1910, §§ 5033, 5125, the refusal of the court to permit the plaintiff below, after the introduction of the evidence, to dismiss without prejudice, to which it excepted, was error. Boardman Co. v. Board of Com'rs of Atoka County (Okl.) 174 P. 272.

[45] Warner v. Warner, 112 P. 97, 83 Kan. 548.

[46] Dickerman v. Crane, 57 P. 305, 8 Kan. App. 795.

[47] Hutchison v. Brown (Okl.) 167 P. 624.

Where demurrer to the evidence was sustained, and the jury discharged, and a motion for new trial overruled, and judgment rendered against plaintiff, the court had power thereafter, at the same term, on motion of plaintiff, to vacate the judgment and grant plaintiff's motion to dismiss without prejudice and render a new judgment against him for costs. Missouri Pac. Ry. Co. v. Berry, 98 P. 204, 79 Kan. 19.

Where a court is considering a demurrer to plaintiff's evidence, and giving reasons why it will have to be sustained, it is error to overrule an application by plaintiff to dismiss without prejudice. Pugsley v. Chicago, R. I. & P. Ry. Co., 77 P. 579, 69 Kan. 599.

reinstate it depends on the particular facts, and is not governed by any general rule.[48]

A motion for a nonsuit is available in cases tried to the court without a jury.[49]

While the plaintiff has a right to dismiss without prejudice, a defendant, brought into court by summons, has no right to demand that the action be dismissed as to any proper party plaintiff.[50]

Where both parties claim to own and be in possession of real estate, the subject of an action to quiet title, and pray for judgment and introduce evidence presenting questions of law and fact, it is error to dismiss the action.[51]

The trial court, in the exercise of its discretion, may dismiss an action without prejudice after it has sustained a demurrer to the evidence and heard and overruled a motion for a new trial.[52]

When the question of jurisdiction was properly presented and it appeared that a local defendant was sued to subject a nonresident defendant to litigation in the county where the suit was brought, the nonresident was entitled to a dismissal.[53]

In the absence of a showing of prejudice, a petition filed in the office of the clerk of the district court will not be dismissed because entitled in, and by the clerk given, the same docket number as a former case between the same parties which had been finally closed in that court.[54]

The question of the ownership of notes sued on cannot be raised by a motion to dismiss.[55]

It is indispensable, to give a court jurisdiction in attachment proceedings, that there should be personal service of the summons in the action upon the defendant, or that the order of attachment be levied upon property of the defendant, or that an order of gar-

[48] Bane v. Cox, 88 P. 1083, 75 Kan. 184.

[49] Lyon v. Lyon, 39 Okl. 111, 134 P. 650.

[50] Roberts v. Tomlinson, 57 P. 1060, 9 Kan. App. 85.

[51] Wilkinson v. Mears, 94 P. 136, 77 Kan. 273; Inman v. Same, 94 P. 136, 77 Kan. 853.

[52] National Hotel Co. v. Crane Bros. Mfg. Co., 31 P. 682, 50 Kan. 49, following Ashmead v. Ashmead, 23 Kan. 262.

[53] Makemson v. Edwards, 101 Kan. 269, 166 P. 508.

[54] Allison v. Bryan, 109 P. 934, 26 Okl. 520, 30 L. R. A. (N. S.) 146, 138 Am. St. Rep. 988.

[55] Waldock v. Winkler, 51 Okl. 485, 152 P. 99.

nishment should be served upon a garnishee having property in his possession belonging to the defendant, or who is indebted to such defendant, otherwise any proceedings taken in the cause are coram non judice and void, and the cause must be dismissed.[56]

§ 530. —— Process—Pleadings—Noncompliance with order

An action will not be dismissed, on motion of defendant, because there was no service of summons on him within 60 days from the filing of a petition.[57]

In an original action in the supreme court, where the parties submit the case on the pleadings, and the pleadings fail to disclose a right of recovery in plaintiff, a judgment of dismissal and for costs will be entered.[58]

Where the court directs that plaintiff amend his petition by striking out irrelevant and redundant allegations the court may, on plaintiff's refusal to so amend, dismiss the action.[59]

Likewise, where the court properly sustained a motion to require three causes of action set out in a petition to be separately stated and numbered, on the refusal of the plaintiff to comply with the order, a dismissal of the action was not error.[60]

An action against an agent and trustee for money for which he had not accounted after demand was properly dismissed on failure of plaintiff to comply with an order to make the petition definite by stating approximately the date of demand.[61]

§ 531. —— Continuance

When a continuance is granted as to one member of a defendant partnership, and plaintiff refuses to proceed with the trial against the other and recover a separate judgment, there is no error in dismissing the action as to him, without prejudice.[62]

It is error for the district court to dismiss an appeal from a

[56] Central Loan & Trust Co. v. Campbell Commission Co., 49 P. 48, 5 Okl. 396, judgment reversed 19 S. C. 346, 173 U. S. 84, 43 L. Ed. 623.

[57] Green v. McCracken, 67 P. 857, 64 Kan. 330.

[58] Territory v. Jacobs, 70 P. 197, 12 Okl. 152.

[59] Drake v. First Nat. Bank of Ft. Scott, 7 P. 219, 33 Kan. 634.

[60] Burdick v. Carbondale Inv. Co., 80 P. 40, 71 Kan. 121.

[61] Null v. Potts, 157 P. 415, 98 Kan. 1.

[62] Clark v. Dekker, 23 P. 956, 43 Kan. 692.

justice of the peace, because the record fails to show that a continuance for more than 90 days was with the consent of the parties.[63]

§ 532. —— Want of prosecution

A case should be dismissed without prejudice where the plaintiff fails to appear, and defendant does not file a counterclaim or set-off.[64]

Where specifications and charges for disbarment were filed and a referee was appointed, who filed a report, and where the complainant, after the matter was called to his attention by the referee, took no action, the proceeding will be dismissed for want of prosecution.[65]

When an application for a writ of prohibition had been made, and time extended to the petitioner in which to file briefs, and the same are not filed within such time, the application may be dismissed for want of prosecution.[66]

Where, after issue joined, the parties enter into and file a stipulation that the case shall be submitted to the court without a jury, to be decided upon documents then on file, and to be taken up by the court at its pleasure, without reference to the presence of attorneys of either party, and the court's attention is called to the stipulation, it is error for the court thereafter, in the absence of plaintiff's attorney, to dismiss the action for want of prosecution.[67]

§ 533. Forms—Motion to dismiss—Order

MOTION TO DISMISS

(Caption.)

Now comes the said defendant, and moves the court to dismiss the above-entitled action for want of prosecution for the reason that the plaintiff failed to appear at the time said cause had been regularly set down for trial, to wit, on the ——— day of ———, 19—.

X. Y., Attorney for Defendant.

[63] Rhyne v. Manchester Assur. Co., 78 P. 558, 14 Okl. 555.
[64] Kansas City, W. & N. W. R. Co. v. Walker, 32 P. 365, 50 Kan. 739.
[65] In re Townsend (Okl.) 168 P. 218.
[66] Seargeant v. Cullison, 38 Okl. 154, 132 P. 345.
[67] Lardner v. Windle, 45 P. 945, 4 Kan. App. 175.

ORDER

(Caption.)

Now on this ——— day of ———, 19—, this cause comes on for hearing on the motion of the defendant to dismiss said action for want of prosecution, and it appearing to the court that said cause has heretofore been regularly set down for hearing on this date, and the plaintiff failing to appear on the trial to prosecute said cause, either in person or by attorney.

It is by the court ordered and adjudged that said cause be and the same is hereby dismissed at the cost of plaintiff, without prejudice to a future action.

———, Judge.

MOTION TO DISMISS FOR WANT OF JURISDICTION

(Caption.)

Now comes the said defendant for the purpose of this motion only, and not appearing herein for any other purpose, and moves the court to dismiss this action upon the ground that it has no jurisdiction of the defendant, for the reason that no service of summons, either actual or constructive, has been made upon said defendant, and said defendant has not appeared herein except for the purpose of this motion.

X. Y., Attorney for Defendant,
For the Purpose of This Motion Only.

§ 534. Reinstatement

Within the term of court, the trial court or judge may vacate an order or judgment dismissing an action at plaintiff's cost, and may order the cause reinstated and grant time to file amended pleadings.[68]

If an order of dismissal has been entered, but is afterwards, at the same term, set aside, and the cause continued for a further hearing, the court does not thereby lose jurisdiction of the parties.[69]

A cause may be reinstated after dismissal without service of a

[68] Mulcahy v. City of Moline, 171 P. 597, 101 Kan. 532, 102 Kan. 531; Chinn v. Bretches, 22 P. 426, 42 Kan. 316.

[69] Hutchinson Salt & Stock Yards Co. v. Baldridge, 36 P. 1005, 53 Kan. 522.

new summons, where the order of reinstatement is made at the same term and while the opposing counsel is in court.[70]

Where the plaintiff's action is dismissed, but the case is continued as to defendant's counterclaim, the court has no authority, at a subsequent term, before the issues raised by the counterclaim have been tried, to reinstate plaintiff's action upon motion.[71]

A motion to set aside a dismissal having been overruled, a court cannot, three months thereafter, set aside the order, and reinstate the case.[72]

A cause having been dismissed for want of prosecution, and application filed to reinstate the cause for unavoidable casualty, the court should exercise a wise discretion, and where it clearly appears by affidavits that the party was unavoidably absent, that his defense was meritorious, that he appeared immediately after the time set for trial and before adjournment, and was unavoidably absent, the case should be reinstated.[73]

Where a case has been set for trial, and the attorneys absent themselves from the courtroom, and during their absence the case is reached and dismissed for want of prosecution, and the only showing is that they left the room a short time before the noon adjournment, believing the case on trial would last the remainder of that session, it is not error to refuse to reinstate the same.[74]

If an action is dismissed and afterwards reinstated, and a trial thereof had, no error can be predicated on the dismissal.[75]

§ 535. Dismissal without order of court

"A plaintiff may, on the payment of costs and without an order of court, dismiss any civil action brought by him at any time before a petition of intervention or answer praying for affirmative relief against him is filed in the action. A plaintiff may, at any time before the trial is commenced, on payment of the costs and without any order of court, dismiss his action after the filing of a petition of intervention or answer praying for affirmative re-

70 Pierce v. Shelton, 144 P. 219, 93 Kan. 189.
71 Rumsey v. Kiowa Town Co., 53 P. 886, 7 Kan. App. 674.
72 Kauter v. Fritz, 47 P. 187, 5 Kan. App. 756.
73 Aultman-Taylor Machinery Co. v. Caldwell, 78 P. 319, 14 Okl. 472.
74 Kline v. Higday, 79 P. 774, 15 Okl. 137.
75 Howe v. Parker, 90 P. 15, 18 Okl. 282.

lief, but such dismissal shall not prejudice the right of the intervenor or defendant to proceed with the action. Any defendant or intervenor may, in like manner, dismiss his action against the plaintiff, without an order of court, at any time before the trial is begun on payment of the costs made on the claim filed by him. All parties to a civil action may at any time before trial, without an order of court, and on payment of costs, by agreement, dismiss the action. Such dismissal shall be in writing and signed by the party or his attorney, and shall be filed with the clerk of the district court, the judge or clerk of the county court, or the justice, where the action is pending who shall note the fact on the proper record: Provided, such dismissal shall be held to be without prejudice, unless the words 'with prejudice' be expressed therein." [76]

A dismissal complying with this statute becomes effective immediately on the filing of same, without an order of court.[77]

Before a motion by plaintiff to dismiss the cause can become effective, it is necessary that all costs accumulated up to the time of the filing of the motion be paid.[78]

[76] Rev. Laws 1910, § 5126; Davis v. Mimey, 60 Okl. 244, 159 P. 1112.

Filing by defendants of motion to dismiss signed by plaintiff did not operate as dismissal under Rev. Laws 1910, § 5126, where on hearing trial court found that plaintiff did not understand effect of motion and wished to continue action. Mullen v. Noah, 64 Okl. 181, 166 P. 742.

In an action on an attachment undertaking by the assignee of defendant in the attachment for damages against the sureties, it appeared that the principal on the undertaking, who was not made a party, had a judgment against defendant in the attachment, obtained in the attachment action, greatly in excess to the alleged damages, which was unpaid, and that defendant in the attachment was insolvent. Held that, after the principal had been made a party and had filed an answer setting forth such facts, it was not error to refuse to allow plaintiff to dismiss his action against the principal, so that he might proceed against the sureties alone. Gerson v. Hanson, 9 P. 230, 34 Kan. 590.

[77] Stuart v. Hicks, 52 Okl. 665, 153 P. 143; Davis v. Mimey, 60 Okl. 244, 159 P. 1112.

A cause held effectively dismissed without prejudice on the date on which plaintiff filed a written dismissal thereof, though subsequent thereto defendant filed a stipulation of dismissal with prejudice obtained from plaintiff prior to dismissal by him. Stuart v. Hicks, 52 Okl. 665, 153 P. 143.

[78] Oklahoma City Land & Development Co. v. Patterson (Okl.) 175 P. 934; Davis v. Mimey, 60 Okl. 244, 159 P. 1112; Interstate Crude Oil Co. v. Young, 118 P. 257, 29 Okl. 465.

In ejectment, and to clear title to land, where C. filed a cross-petition setting up his interest, and thereafter filed a written dismissal of cross-petition, but paid no part of costs, there was no dismissal as to him and the court did

VOLUNTARY DISMISSAL

(Caption.)

Comes now the above-named plaintiff and dismisses this action, at his cost, without prejudice to a future action.

G. H., Attorney for Plaintiff.

STIPULATION TO DISMISS

(Caption.)

It is hereby stipulated and agreed by and between the parties hereto, that the above-entitled action be dismissed, at the cost of plaintiff (or defendant) with (or without) prejudice to a future action.

G. H., Attorney for Plaintiff.
X. Y., Attorney for Defendant.

§ 536. Parties

Where the trustees of a church sue for specific performance, and two of them move to dismiss, contrary to the wishes of the members of the church, the court did not err in allowing the suit to proceed under the direction of the other trustees elected to their place.[79]

§ 537. Dismissal as to part of defendants

Plaintiff can, before trial, dismiss as to one of the defendants without affecting the liability of the codefendants.[80]

The filing of an amended petition omitting the name of one defendant and not referring to or adopting any part of the original petition operates as a dismissal as to the defendant omitted.[81]

§ 538. Trial of counterclaim after dismissal

"In any place where a set-off or counterclaim has been presented, the defendant shall have the right of proceeding to the trial of his

not err in overruling his motion to reinstate the case. Cowokochee v. Chapman (Okl.) 171 P. 50.

Plaintiff has the right, after payment of costs, to dismiss his action, without an order of court at any time before trial is commenced, but the filing of the præcipe without paying of costs is not a dismissal of the action. State v. Pitchford (Okl.) 171 P. 448.

[79] Berry v. Second Baptist Church of Stillwater, 130 P. 585, 37 Okl. 117.

[80] Edwards v. Renstrom, 65 P. 249, 63 Kan. 883.

[81] Rogers v. Bass & Harbour Co., 47 Okl. 786, 150 P. 706.

claim, although the plaintiff may have dismissed his action or failed to appear." [82]

Where one filed a written dismissal, which the court refused to set aside, the rendering of a final judgment, without giving him his day in court as a defendant, and upon the issues joined upon the allegations of his answer and cross-petition was error.[83]

When a defendant files a cross-petition against a codefendant, his right to have such cross-petition tried is not affected by the dismissal of the petition by the plaintiff as to such codefendant.[84]

In a suit to have two deeds adjudged mortgages and for an accounting, wherein judgment was entered declaring the deeds to be mortgages and the hearing on the accounting was continued, plaintiffs' motion to dismiss their action for accounting was properly overruled, where it appeared that defendant had rights which should be determined in the action in which the deeds were declared to be mortgages.[85]

An answer setting up limitations against the foreclosure of a mortgage, followed by a prayer for the cancellation of the mortgage, and the quieting of defendant's title to the mortgaged premises, is not a set-off or counterclaim, so as to entitle the defendant to a trial notwithstanding the dismissal of the action by the plaintiff.[86]

§ 539. Jurisdiction subsequent

When a motion to dismiss is made by the plaintiff and called to the attention of the court, its jurisdiction over the parties and the subject-matter is at an end, except to render and enter a formal order of dismissal.[87]

[82] Rev. Laws 1910, § 5127; Wyman v. Herard, 59 P. 1009, 9 Okl. 35.

Where plaintiff in ejectment dismisses his cause of action after defendant has filed a counterclaim claiming an interest in the land and asking affirmative relief, defendant has a right to proceed to trial upon such counterclaim. Long v. Bagwell, 38 Okl. 312, 133 P. 50.

[83] Cowokochee v. Chapman (Okl.) 171 P. 50.

[84] Kolp v. Parsons, 50 Okl. 372, 150 P. 1043.

[85] Holmes v. Holt, 136 P. 246, 90 Kan. 774, judgment affirmed on rehearing 139 P. 1030, 92 Kan. 254, and affirmed on second rehearing 142 P. 369, 93 Kan. 7.

[86] Corlett v. Mutual Ben. Life Ins. Co., 55 P. 844, 60 Kan. 134.

[87] New Hampshire Banking Co. v. Ball, 51 P. 899, 59 Kan. 55.

CHAPTER XI

PLEADINGS

Sections
540–544. Article I.—In general.
545–553. Article II.—Rules of pleading.
554–561. Article III.—Rules for construing pleadings.
562–587. Article IV.—Petition.
562. Division I.—In general.
563–579. Division II.—Contents, form, sufficiency, and construction.
580–585. Division III.—Joinder, splitting, consolidation, and severance.
586–587. Division IV.—Exhibits and prayer.
588–637. Article V.—Answer.
588–602. Division I.—Answer in general.
603–606. Division II.—General denial.
607–615. Division III.—Verified denial.
616–635. Division IV.—Counterclaim and set-off.
636–637. Division V.—Unauthorized pleas.
638–645. Article VI.—Reply.
646–648. Article VII.—Filing and subscribing.
649–660. Article VIII.—Amended and supplemental pleadings.
661–664. Article IX.—Defects and objections.
665–702. Article X.—Motions and orders thereon.
665–673. Division I.—Motions in general.
674–678. Division II.—Orders.
679–702. Division III.—Particular motions.
703–721. Article XI.—Demurrer.
722–733. Article XII.—Issues, proof, and variance.
722–728. Division I.—Issues.
729–732. Division II.—Proof.
733. Division III.—Variance.

ARTICLE I

IN GENERAL

Sections
540. Defined.
541. Pleadings allowed.
542. Nature, how determined.
543. Caption—Forms.
544. Counties.

§ 540. Defined

"The pleadings are the written statements, by the parties, of the facts constituting their respective claims and defenses." [1]

[1] Rev. Laws 1910, § 4734.

§ 541. Pleadings allowed

"The only pleadings allowed are:

"First. The petition by the plaintiff.

"Second. The answer or demurrer by the defendant.

"Third. The demurrer or reply by the plaintiff.

"Fourth. The demurrer by the defendant to the reply of the plaintiff." [2]

"All fictions in pleadings are abolished.[3]

§ 542. Nature, how determined

The nature of a pleading is determined, not by the title, but by the subject-matter. A motion to dismiss, setting up defensive matters, cannot be treated as a motion, but may be treated as an answer.[4]

§ 543. Caption—Forms

"The title of a cause shall not be changed in any of its stages." [5]

CAPTIONS

State of Oklahoma, } ss.:
County of ———. }

In the ——— Court of Said County and State.

A. B., Plaintiff,

v.

C. D., Defendant.

A. B., a Minor, by E. F., His Next Friend, Plaintiff,

v.

C. D., a Minor, Defendant.

A. B., Sheriff of ——— County, Oklahoma, Plaintiff,

v.

C. D., Defendant.

A. B., C. D., and E. F., Partners as B., D. & F. Co., Plaintiffs,

v.

G. H. and I. J., Partners as H. & Co., Defendants.

[2] Rev. Laws 1910, § 4736.
[3] Rev. Laws 1910, § 4767.
[4] State v. City of Muskogee (Okl.) 172 P. 796.
[5] Rev. Laws 1910, § 4768.

A. B. C. Company, a Corporation, Plaintiff,
v.
C. D. Railroad Co., a Corporation, Defendant.

A. B., Executor of the Will of E. F., Deceased, Plaintiff,
v.
C. D., Administrator of the Estate of G. H., Deceased, Defendant.

A. B., as Assignee for the Benefit of the Creditors of E. F., Plaintiff,
v.
C. D., Defendant.

§ 544. Counties

"In all suits or proceedings by or against a county, the name in which a county shall sue or be sued shall be, 'Board of County Commissioners of the County of ———,' but this provision shall not prevent county officers, where authorized by law, from suing in their official name for the benefit of the county." [6]

ARTICLE II

RULES OF PLEADING

Sections
545. Former rules abolished.
546. What must be pleaded.
547. Special matters.
548. Estoppel.
549. Pleading conclusions and law.
550. Pleading evidence.
551. Uncertainty in pleadings.
552. Pleading in the alternative.
553. Pleading by reference.

§ 545. Former rules abolished

"The rules of pleading heretofore existing in civil actions are abolished; and hereafter, the forms of pleadings in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this code." [7]

[6] Rev. Laws 1910, § 1500.
[7] Rev. Laws 1910, § 4735.

§ 546. What must be pleaded

It is not necessary to plead facts of which the court will take judicial notice.[8]

There need be no direct allegation of a fact which otherwise sufficiently appears or of facts necessarily implied from averments in the petition.[9]

§ 547. —— Special matters

A party relying on the defense of accord and satisfaction must both plead and prove the offer and acceptance by the parties.[10]

Where the transferee of a note desires to avoid equities as between the original parties, he must plead and prove that the note was transferred by indorsement.[11]

The insurer should plead and prove its contention that insured's

[8] French v. State Senate, 80 P. 1031, 146 Cal. 604, 69 L. R. A. 556, 2 Ann. Cas. 756.

By chapter 98, Laws 1893, the territory formerly known as "Garfield county, Kansas," was made a municipal township of Finney county for judicial purposes. Held, that in an action against the township to recover upon indebtedness created by the county the de facto existence of the county, the existence of the township of Garfield, the succession of the township to the county, and the liability of the township for the debts of the county are facts of which the court will take judicial notice, and need not be pleaded. Garfield Tp. v. Dodsworth, 58 P. 565, 9 Kan. App. 752.

[9] That a minor child's earnings have been relinquished to him will be implied, in an action brought by the father as such, and as next friend for the minor, for damages for decreased earning power, from averments in the petition that the minor is entited to recover in his own suit, though emancipation of the minor is not specifically alleged, Revel v. Pruitt, 142 P. 1019, 42 Okl. 696.

The use of the word "fraud" in stating the conduct of a party sought to be charged for false representations is unnecessary where the facts stated are sufficient to show fraudulent conduct and resulting injury. Way v. Bronston, 138 P. 601, 91 Kan. 446.

Where a petition though not using the word "dedication," alleges facts showing a dedication for a public highway by conduct of the owner and acceptance and user by the public, dedication may be relied on. Kansas City v. Burke, 144 P. 193, 93 Kan. 236, denying rehearing 141 P. 562, 92 Kan. 531.

In an action by a partnership an allegation of compliance with Rev. Laws 1910, §§ 4469, 4471, requiring the filing of a certificate of the names of the partners where a fictitious name or designation is used, is not required, as it is presumed that the law has been complied with. Oklahoma Fire Ins. Co. v. Wagester, 38 Okl. 291, 132 P. 1071.

[10] Deming Inv. Co. v. McLaughlin, 30 Okl. 20, 118 P. 380.

[11] Gault v. Kane, 44 Okl. 763, 145 P. 1128.

death was due to a cause excepted from the accident policy sued on.[12]

When an action is brought against a nonresident of the state in the district court, which is a court of general jurisdiction, it is not necessary to allege in the petition that defendant may be found in the county where the action is brought, or that he has property in the county.[13]

§ 548. —— Estoppel

Estoppel, to be available as part of a cause of action or defense, must be pleaded with particularity.[14]

[12] Union Accident Co. v. Willis, 44 Okl. 578, 145 P. 812, L. R. A. 1915D, 358.

[13] Bohart v. Republic Investment Co., 30 P. 180, 49 Kan. 94.

[14] Halsell v. First Nat. Bank of Muskogee, 48 Okl. 535, 150 P. 489, L. R. A. 1916B, 697; Tonkawa Milling Co. v. Town of Tonkawa, 83 P. 915, 15 Okl. 672; Nance v. Oklahoma Fire Ins. Co., 31 Okl. 208, 120 P. 948, 38 L. R. A. (N. S.) 426; Halsell v. First Nat. Bank of Muskogee, 48 Okl. 535, 150 P. 489, L. R. A. 1916B, 697; McKallip v. Geese, 30 Okl. 33, 118 P. 586; Fidelity Mut. Life Ins. Co. of Philadelphia, Pa., v. Dean, 57 Okl. 84, 156 P. 304; Cooper v. Flesner, 103 P. 1016, 24 Okl. 47, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29; Insurance Co. of the State of Pennsylvania v. Harris, 49 Okl. 165, 152 P. 359; Bunker v. Harding (Okl.) 174 P. 749.

A waiver relied upon as an estoppel against defendant to take advantage of a breach by plaintiff of the contract sued on must be specially pleaded. American Jobbing Ass'n v. James, 103 P. 670, 24 Okl. 460.

For an estoppel or waiver of the conditions of a benefit certificate prohibiting entering on hazardous occupations to be available to the beneficiary, it must be specifically pleaded. Modern Woodmen of America v. Weekley, 139 P. 1138, 42 Okl. 25.

Waiver of conditions of policy, to be available, must be specifically pleaded. Edwards v. Sovereign Camp, Woodmen of the World, 61 Okl. 243, 161 P. 170.

In action for freight, contract of consignor and consignee as to payment of freight cannot be pleaded as defense, in absence of plea raising estoppel, to which such contract was germane. Indiana Harbor Belt R. Co. v. Britton, 56 Okl. 750, 156 P. 894.

The town council of an incorporated town is not estopped to rely on the invalidity of an ordinance amending another ordinance extending the time set in the ordinance amended for furnishing gas to the inhabitants of said town, where such estoppel is not pleaded, and the evidence fails to disclose that the grantee of said franchise or its assignee was misled to its injury Town of Sapulpa v. Sapulpa Oil & Gas Co., 97 P. 1007, 22 Okl. 347.

In action to subject wife's separate property to payment of husband's debts, facts showing her estoppel by conduct must be specifically pleaded. Farmers' State Bank of Ada v. Keen (Okl.) 167 P. 207.

Estoppel in pais against maker of instrument materially altered, to be available, must be pleaded. Wayne County Nat. Bank v. Kneeland, 61 Okl. 265, 161 P. 193.

No intendments are indulged in favor of a plea of estoppel, and every essential element of estoppel must be averred.[15]

If the facts constituting estoppel are in any way sufficiently pleaded, the pleader is entitled to the benefit of the estoppel though it is not formally pleaded.[16]

§ 549. Pleading conclusions and law

It is neither necessary nor sufficient to plead mere conclusions,[17] or statements of law;[18] but a petition is not demurrable, though it

[15] Holt v. Holt, 102 P. 187, 23 Okl. 639.

[16] Jones v. S. H. Kress & Co., 54 Okl. 194, 153 P. 655.

[17] Where there is no averment of facts from which the conclusions of law are drawn, the same will have no force in a pleading. International Harvester Co. of America v. Cameron, 105 P. 189, 25 Okl. 256.

Where the petition in an employé's action for injuries states facts implying that defendant has negligently failed to provide a reasonably safe place to work, it need not state the legal conclusion to that effect. Barnett v. United Kansas Portland Cement Co., 139 P. 484, 91 Kan. 719.

Conclusions.—The allegation that county commissioners have advertised for bids, and, unless interfered with, will let a contract for a bridge at a certain point with a further allegation that the advertisement for the contract has not as they verily believe been posted as required by law, is, as to the latter, a statement merely of a legal conclusion, and the petition based thereon is demurrable. Smith v. Board of Com'rs of Rogers County, 110 P. 669, 26 Okl. 819.

A petition in ejectment which sets forth in general terms the fact that illegal interest, penalties, and costs were charged against real property sold for taxes, and the deed was void because separate school taxes were assessed against the property, and that a special tax was illegally assessed against the property, the same being a part of the taxes, interest, and expenses for which the property is sold, does not, on demurrer, state facts sufficient to raise such questions; it being necessary to show wherein the tax was illegal or the expenses illegally charged. Jones v. Carnes, 87 P. 652, 17 Okl. 470.

An allegation that a certain person is not now, and never has been, the legally appointed assignee for another person, is a mere conclusion. Smith v. Kaufman, 41 P. 722, 3 Okl. 568.

Defendant's petition to vacate judgment, averring that he has a good defense, as shown by his answer on file in the cause, but not making such answer a part of the petition, is insufficient as stating a mere legal conclusion. Tracy v. State, 60 Okl. 109, 159 P. 496.

The allegation of a petition that there was and is no high school in the county which has been established or created according to law, equivalent to the allegation that the high school established was illegal, is a mere conclu-

[18] A statement, in a petition in an action to vacate a judgment, which alleges that no publication notice as required by law has been filed, is a statement of law, not a statement of fact. Townsend v. Burr, 60 P. 477, 9 Kan. App. 810.

states a conclusion of the pleader, where it states the facts on which such conclusion is based.[19]

But it is a sufficient allegation of facts, if a petition sets forth such facts as are probative with reference to the issue to be established, and it is unnecessary to set out the evidentiary facts.[20]

§ 550. Pleading evidence

It is not good practice to plead evidence and the granting of a motion to strike out the evidence when pleaded will not be disturbed.[21]

In an action by a wife for the alienation of the affections of her husband, a statement in the petition of the ultimate facts of the alienation and separation is enough without pleading the acts done and artifices used to accomplish the result.[22]

§ 551. Uncertainty in pleadings

The essential facts of a cause of action or defense should be unequivocally alleged. Where the averments of the pleading are conditional, contingent, and conjectural, it will be held insufficient.[23]

sion of law, insufficient against direct challenge by demurrer. Houser v. Smith, 101 P. 1001, 80 Kan. 260.

An answer which merely denies the debt sued on, without denying the facts on which it is based, where they are pleaded in the petition, is insufficient to raise an issue of fact. Jackson v. Green, 74 P. 502, 13 Okl. 314.

Where petition alleges injury by negligence of defendant, a part of an answer, additional to a general denial, merely stating that the act of defendant was rightful, is demurrable. Murray v. Empire Dist. Electric Co., 150 P. 533, 96 Kan. 336.

In action against city for personal injury, from alleged unsafe condition of street or sidewalk, a general allegation "that the plaintiff's negligence caused the injury" was a mere conclusion, and not a sufficient allegation of contributory negligence. City of Cushing v. Bowdlear (Okl.) 177 P. 561.

[19] Maple v. State, 142 P. 1182, 43 Okl. 277.

Statements of fact.—In a reply attacking tax deeds alleging that they fail to show the date of sale, that the notice of sale does not show by whom it was made or the place of sale, and other specifications of fact, a statement that no notice of final redemption was published as required by law will be regarded as a statement of fact. Wolf v. Wolf, 128 P. 374, 88 Kan. 205.

[20] City of Guthrie v. Finch, 75 P. 288, 13 Okl. 496.

[21] Cahill v. Pine Creek Oil Co., 136 P. 1100, 40 Okl. 176.

[22] White v. White, 90 P. 1087, 76 Kan. 82.

[23] Atchison, T. & S. F. Ry. Co. v. Atchison Grain Co., 70 P. 933, judgment modified (1904) 75 P. 1051, 68 Kan. 585, 1 Ann. Cas. 639.

A pleading should contain a positive statement of essential facts; and it must be held insufficient where it merely states that such facts are alleged to exist. Byington v. Saline County Com'rs, 16 P. 105, 37 Kan. 654.

The allegations in a petition should be sufficiently certain to enable the court to understand, not only the wrongs complained of, but also the correct measure of redress.[24]

Essential facts necessary to be shown to entitle a party to the relief demanded should be stated in the pleadings by allegation or averment, and not by way of recital.[25]

§ 552. Pleading in the alternative

An alternative statement of facts, under either of which the opposite party would be liable, may be pleaded, where it is impossible for the pleader to know which of such statements are true.[26]

§ 553. Pleading by reference

Allegations in another pleading in the same case may be made a part of a pleading by reference thereto and adoption thereof.[27]

ARTICLE III

RULES FOR CONSTRUING PLEADINGS

Sections

554. Liberal construction.
555. General and specific allegations.
556. Admissions.
557. Presumptions.
558. Surplusage.
559. Construction against pleader.
560. Construing allegations together.
561. Construed as of what time.

§ 554. Liberal construction

"In the construction of any pleading, for the purpose of determining its effect, its allegations shall be liberally construed; with a view to substantial justice between the parties." [28]

[24] Midland Valley R. Co. v. Featherstone, 123 P. 1123, 32 Okl. 837.

[25] Emmerson v. Botkin, 109 P. 531, 26 Okl. 218, 29 L. R. A. (N. S.) 786, 138 Am. St. Rep. 953.

[26] Where an employé is injured, either by the willful or intentional act of the employer, or the failure to exercise ordinary care on the part of such employer, such employé or his representative may plead both in the alternative in one count. Chicago, R. I. & P. Ry. Co. v. McIntire, 119 P. 1008, 29 Okl. 797.

[27] In action on notes, where answer and cross-petition set out execution and transfer of notes secured by chattel mortgage, the reply might refer to such allegation in cross-petition, and thereby make them a part of the reply. Lower v. Shorthill, 103 Kan. 534, 176 P. 107.

[28] See note 28 on following page.

Where the allegations of a petition clearly show that the plaintiffs have no adequate remedy at law, it is unnecessary to so allege.[29]

Under this statute averments of pleadings must be so construed that substantial justice may be done between the parties though essential averments lacking in a pleading need not be construed into it, or a necessary averment be supplied, unless it must necessarily be inferred from other pleadings.[30]

A pleading will not be construed so as to defeat it by undue technicality.[31] It will be liberally construed on objection to the introduction of any evidence,[32] and on a demurrer to the evidence,[33]

[28] Rev. Laws 1910, § 4766; Bank of Glasco v. Marshall, 47 P. 561, 5 Kan. App. 252.

An allegation, in an employé's action for injuries, that defendant knew or should have known of a certain defect was an implied allegation that such defect existed. Roberts v. Pendleton, 142 P. 289, 92 Kan. 847.

After a party has amended his petition three times, and a demurrer is again sustained to it, no presumption will be indulged in favor of the pleading. Schilling v. Moore, 125 P. 487, 34 Okl. 155.

[29] Clark v. Frazier (Okl.) 177 P. 589.

[30] Weatherly v. Sawyer, 63 Okl. 155, 163 P. 717; Emmerson v. Botkin, 109 P. 531, 26 Okl. 218, 29 L. R. A. (N. S.) 786, 138 Am. St. Rep. 953.

[31] Smith v. McCarthy, 18 P. 204, 39 Kan. 308.

[32] Against an objection to the introduction of any evidence for plaintiff on the ground that the petition does not state a cause of action, the petition will be liberally construed, and, if possible, sustained. State v. School District No. 3, 8 P. 208, 34 Kan. 237; Burnette v. Elliott, 84 P. 374, 72 Kan. 624; Simmonds v. Richards, 86 P. 452, 74 Kan. 311; Mills v. Vickers, 50 P. 976, 6 Kan. App. 884; Carr v. Seigler, 52 Okl. 485, 153 P. 141; McKee v. Jolly (Okl.) 178 P. 656; Minnetonka Oil Co. v. Cleveland Vitrified Brick Co., 48 Okl. 745, 150 P. 712; Barker v. Moodie, 141 P. 562, 92 Kan. 566.

[33] Gregg v. Oklahoma State Bank (Okl.) 179 P. 613.

Allegations of fraud and consequent damage in procuring credit for insolvents, when tested by demurrer, are to be liberally construed. Blair v. McQuary, 162 P. 1173, 100 Kan. 203, judgment modified on rehearing 164 P. 262, 100 Kan. 203.

The allegations of a petition, challenged by a general demurrer or objection to the introduction of evidence, based upon the insufficiency of the petition, must be construed liberally in favor of the pleader. Ruby v. Warrior (Okl.) 175 P. 355.

In a suit for annulment of a marriage, an allegation that the wife had not been divorced from a former husband will be construed on demurrer to mean that the husband was still living. Browning v. Browning, 130 P. 852, 89 Kan. 98, L. R. A. 1916C, 737, Ann. Cas. 1914C, 1288.

Where a contract is pleaded which is open to two interpretations, one that the contracting parties were honest and innocent in their purposes and ac-

particularly where no motion to make more definite and certain has been made,[34] but doubtful language will be construed against the pleader.[35]

If material allegations are omitted, it will be assumed, without application to amend, that facts to justify them do not exist.[36]

A petition attacked for the first time on appeal on the ground that it does not state facts sufficient to constitute a cause of action will be liberally construed.[37]

The same is true of a counterclaim.[38]

§ 555. General and specific allegations

A specific statement of facts in a pleading will always control a general statement, whether that general statement is or is not regarded as a mere conclusion of law.[39]

tions, and the other that they were immoral and criminal, and the sufficiency of the pleading is challenged on demurrer, an interpretation will be given in favor of honesty and innocence, and which will uphold the validity of the contract and the sufficiency of the pleading. Atchison, T. & S. F. Ry. Co. v. Atchison Grain Co., 70 P. 933, judgment modified 75 P. 1051, 68 Kan. 585, 1 Ann. Cas. 639.

[34] Where a demurrer is filed to a petition on the ground that it does not state facts sufficient to constitute a cause of action, without first presenting a motion to have the allegations of the petition made more definite and certain, the statements of such petition will be liberally construed in favor of the pleader. Upham v. Head, 85 P. 1017, 74 Kan. 17; Balmer v. Long, 104 Kan. 408, 179 P. 371.

[35] Lusk v. Porter, 53 Okl. 294, 156 P. 224; Atwood v. Rose, 122 P. 929, 32 Okl. 355.

After a motion to make certain allegations of a petition more definite and certain has been overruled, such pleading in respect to such allegations cannot be upheld as against a general demurrer, unless it fairly states a cause of action without resort to inferences or construction of doubtful language. Mergen v. Salina Northern R. Co., 104 Kan. 811, 180 P. 736.

[36] Fretz v. City of Edmond (Okl.) 168 P. 800, L. R. A. 1918C, 405.

[37] Wass v. Tennent-Stribbling Shoe Co., 41 P. 339, 3 Okl. 152; Hoehler v. Short, 140 P. 146, 40 Okl. 681; Cook v. State, 130 P. 300, 35 Okl. 653; Missouri Pac. Ry. Co. v. Morrow, 13 P. 789, 36 Kan. 495; Kansas City & S. W. Ry. Co. v. Farnsworth, 18 P. 202, 39 Kan. 356.

[38] Where the sufficiency of the counterclaim is not challenged below, and the evidence taken thereon is not in the record, a judgment for defendant will not be disturbed because the averments of the counterclaim would have been subject to a motion to make more definite and certain. Brown Shoe Co. v. Cuff, 132 P. 1090, 37 Okl. 776.

[39] Whitaker v. Crowder State Bank, 110 P. 776, 26 Okl. 786.

A petition containing general averments of negligence, and stating that the negligence "hereinbefore complained of consisted in this," presents only such

§ 556. Admissions

Where a party to an action makes solemn admissions against his interest in a pleading in the absence of mistake on his part, or on the part of his counsel who inserted them in such pleading, a court, in passing on the sufficiency of a subsequent amended pleading filed by him should take such admissions into consideration, and treat them as admitted facts in the case.[40]

A party should be bound by the allegations of his pleadings, deliberately made, and should not be allowed to obtain benefits from

issues as are found in the specific allegations. Chicago, R. I. & P. Ry. Co. v. McIntire, 119 P. 1008, 29 Okl. 797.

In suit by abutting owner to enjoin ferry landing at end of public highway, general allegations that he would suffer irreparable injury unless landing is enjoined were negatived by his more specific allegations showing that relief was based upon mere fact of such landing. Hale v. Record (Okl.) 168 P. 420.

Where a petition sets out a specific title followed by a general averment of ownership, it will be understood that this general averment refers to the specific title, and the testimony will be limited to such title. Armour Bros. Banking Co. v. Riley County Bank, 1 P. 506, 30 Kan. 163.

[40] Lane Implement Co. v. Lowder, 65 P. 926, 11 Okl. 61.

Where a party to an action makes solemn admissions against his interest in a pleading, they must be treated as admitted facts, and he cannot question the correctness thereof in the trial court or on appeal so long as they remain a part of the record. Rogers v. Brown, 86 P. 443, 15 Okl. 524.

Where, in an action for injury to a shipment of live stock, plaintiff alleged that defendant issued bills of lading, he cannot thereafter claim that the contract of shipment was oral, though in his reply he alleged that the bills of lading were executed as a receipt and for the purpose of entitling plaintiff to return transportation. St. Louis & S. F. R. Co. v. Zickafoose, 39 Okl. 302, 135 P. 406.

One who brought an action to cancel a deed on the ground that it was procured by fraud, and who prays an accounting with her grantee for moneys received for lots sold from land, cannot, at the conclusion of the trial, abandon that theory and insist that the deed be deemed a mortgage, and recover the title to the lots from parties held to be innocent purchasers for value, and without notice. Herbert v. Wagg, 117 P. 209, 27 Okl. 674.

In action for specific performance against a foreign executor, if the executor plead the will to show that it contains no grant of power to convey, he cannot dispute its existence, authenticity, or terms. Niquette v. Green, 106 P. 270, 81 Kan. 569.

In an action of replevin against an officer to recover cattle levied upon by him, wherein the defendant answers, admitting possession, and justifies under a writ of execution, and denies the ownership of the plaintiff, it is error to permit him to prove that he was not in possession of the property at the commencement of the suit. Hursh v. Starr, 49 P. 618, 6 Kan. App. 8.

contradictory and inconsistent allegations therein, even if made in separate counts.[41]

Allegations in a petition which have been superseded by an amended petition complete within itself and not referring to the original petition are not conclusive upon plaintiff.[42]

When the prayer of a petition asks for interest from a certain date, the plaintiff cannot recover interest from a prior date.[43]

If allegations in the answer are inconsistent with each other, the defendant is bound by those allegations which are against himself.[44]

Where a copy of the note sued on is attached to the petition, and defendants admit the execution thereof, they cannot, on the introduction of evidence, be heard to say that the note was changed after its execution, as the admission is of the execution of the note in the very form pleaded.[45]

§ 557. Presumptions

Considerable latitude of presumption is allowed in sustaining a petition, where issue is joined, and it is only attacked at the trial by an objection to evidence.[46]

Where a petition avers facts of a continuous nature which would preclude recovery, they will be presumed to continue unless the petition avers the contrary.[47]

§ 558. Surplusage

Where a pleading, which is otherwise good, contains allegations which are not essential, such allegations may be disregarded as surplusage.[48]

41 Losch v. Pickett, 12 P. 822, 36 Kan. 216.

42 Letcher v. Maloney (Okl.) 172 P. 972; Reemsnyder v. Reemsnyder, 89 P. 1014, 75 Kan. 565.

43 Phenix Ins. Co. of Brooklyn v. Weeks, 26 P. 410, 45 Kan. 751.

44 Mitchell v. Ripley, 49 P. 153, 5 Kan. App. 818; Bierer v. Fretz, 4 P. 284, 32 Kan. 329.

45 White v. Smith, 98 P. 766, 79 Kan. 96.

46 Burnette v. Elliott, 84 P. 374, 72 Kan. 624.

47 Alexander v. Bobier (Okl.) 166 P. 716.

48 Where the facts are fully set out in a petition, and are followed by a formal statement of the pleader's conclusions, such conclusions, if erroneous, may be disregarded as surplusage. Lawton Pressed Brick & Tile Co. v. Ross-

The court may, in its discretion, order such matters stricken out, but such surplusage will not render a pleading subject to demurrer.[49]

§ 559. Construction against pleader

Any pleading containing allegations made by the same party, both affirming and denying a particular thing, carries falsehood upon its face; and in such a case the court may consider as true such of the allegations as are against the pleader.[50]

When the petition states a number of causes of action, and asks for a variety of relief, thereby comprising several of the pre-existing forms of action, its language will, on demurrer, be construed against the pleader.[51]

§ 560. Construing allegations together

In determining whether any one or more of the counts of a petition state a good cause of action, all the facts stated will be considered together.[52]

Kellar Triple Pressure Brick Mach. Co., 124 P. 43, 33 Okl. 59, 49 L. R. A. (N. S.) 395.

Allegation of the answer that insurer had fraudulently misrepresented in her proof of loss the value of the property was put in issue by general denial; and further allegations in the reply, as to waiver of conditions of the policy, were surplusage, and did not constitute a material variance. American Ins. Co. of Newark, N. J., v. Rodenhouse, 128 P. 502, 36 Okl. 211.

Where the answer alleges that insured has failed to comply with conditions precedent to an action, a denial of those allegations in the reply puts them in issue; and a further allegation that defendant has waived the conditions is surplusage. Rochester German Ins. Co. of Rochester, N. Y., v. Rodenhouse, 128 P. 508, 36 Okl. 378.

Where a petition in an action for wrongful ejection of a passenger from a train alleged a violation of the contract of carriage, and also tortious acts of the conductor, the latter allegations may be treated as surplusage. Chase v. Atchison, T. & S. F. Ry. Co., 79 P. 153, 70 Kan. 546.

Allegation in petition that notice of injury had been given, as required by the fellow servant act (Gen. St. 1909, § 6999), is surplusage, where the negligence claimed is that of the master in failing to exercise proper care in furnishing the servant with a safe place in which to work. Young v. Missouri, K. & T. Ry. Co., 108 P. 99, 82 Kan. 332.

[49] Drake v. First Nat. Bank of Ft. Scott, 33 Kan. 634, 7 Pac. 219.

[50] Losch v. Pickett, 12 P. 822, 36 Kan. 216.

[51] Thomas v. Sweet, 14 P. 545, 37 Kan. 183.

[52] McClung v. Cullison, 82 P. 499, 15 Okl. 402.

§ 561. Construed as of what time

The pleadings all relate to the time of the commencement of the suit, the same as if filed at that time, and the rights of the parties are to be determined as they existed when suit was commenced.[53]

ARTICLE IV

PETITION

Sections

DIVISION I.—IN GENERAL

562. Copy for defendant.

DIVISION II.—CONTENTS, FORM, AND CONSTRUCTION

563. Contents.
564. Designation of parties.
565. Of unknown defendant.
566. Necessary allegations.
567. Presumptions—Judicial notice.
568. Judgment—Form.
569. Form and manner of allegations.
570. Election.
571. Contractual conditions precedent—Form.
572. Instrument for payment of money—Private statute—Form.
573. Libel or slander—Form.
574. Construction and operation.
575. Requisites and sufficiency.
576. Fraud—Form.
577. Limitations—Form.
578. Matters necessary to be pleaded.
579. Forms—Petitions.

DIVISION III.—JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE

580. Joinder—Forms of motions.
581. Separately stating and numbering.
582. Where demurrer sustained.
583. Splitting.
584. Consolidation.
585. Order—Forms.

DIVISION IV.—EXHIBITS AND PRAYER

586. Exhibits.
587. Prayer.

DIVISION I.—IN GENERAL

§ 562. Copy for defendant

"A copy of the petition need not accompany the summons, but the defendant or plaintiff shall be entitled to a copy of the petition,

[53] Brown v. Galena Mining & Smelting Co., 4 P. 1013, 32 Kan. 528.

or any other paper filed in the action, upon application to the clerk therefor; and the cost of such copy shall be taxed among the costs in the action." [54]

Division II.—Contents, Form, and Construction

§ 563. Contents

"The petition must contain:

"First. The name of the court, and the county in which the action is brought, and the names of the parties, plaintiff and defendant, followed by the word 'petition.'

"Second. A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition.

"Third. A demand of the relief to which the party supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated; and, if interest thereon be claimed, the time from which interest is to be computed shall also be stated." [55]

"In any action for the recovery of real property, it shall be described with such convenient certainty as will enable an officer holding an execution to identify it." [56]

§ 564. Designation of parties

The omission of the names of the parties is not a fatal defect, where they are set out in the title.[57]

§ 565. —— Of unknown defendant

"When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated, in any pleading or proceeding, by any name or description, and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff, in such case, must state in his petition that he could not ascertain the true name; and the summons must contain

[54] Rev. Laws 1910, § 4704.

[55] Rev. Laws 1910, § 4737.

Where a petition contains all the statutory requirements, it states a cause of action. Kemper v. Lord, 49 P. 638, 6 Kan. App. 64.

[56] Rev. Laws 1910, § 4778.

[57] Scott v. Vulcan Iron Works Co., 122 P. 186, 31 Okl. 334.

the words, 'real name unknown,' and a copy thereof must be served personally upon the defendant." [58]

§ 566. Necessary allegations

Every fact necessary to be proven to entitle the plaintiff to recover must be averred in his pleadings.[59]

§ 567. Presumptions—Judicial notice

"Neither presumptions of law nor matters of which judicial notice is taken, need be stated in the pleading." [60]

§ 568. —— Judgment—Form

"In pleading a judgment, or other determination of a court or officer of special jurisdiction, it shall be sufficient to state that such judgment or determination was duly given or made; and the jurisdiction of any such court or officer shall be presumed until the contrary appears." [61]

PETITION IN ACTION ON JUDGMENT

(Caption.)

Comes now the plaintiff and for cause of action shows to the court:

1. That it is and at all times hereinafter mentioned was a corporation duly created, organized and existing under the laws of the state of ——— and having its principal office and place of business in ——— and in said state.

2. That the defendant is and at all times hereinafter mentioned was a corporation duly created, organized and existing under the laws of the state of ——— and having a principal office and place of business in the city and county of ——— in the state of Oklahoma.

[58] Rev. Laws 1910, § 4794.

[59] Choctaw, O. & G. R. Co. v. Zwirtz, 73 P. 941, 13 Okl. 411.

[60] Rev. Laws 1910, § 4781.

The word "alley," used by itself in a petition in connection with the streets of a town, will be deemed a public way, unless prefixed by the word "private." Bellevue Gas & Oil Co. v. Carr, 61 Okl. 290, 161 P. 203.

[61] Rev. Laws 1910, § 4772.

3. That on or about the ——— day of ———, 19—, plaintiff duly commenced an action against the defendant in the ——— court of the state of ———; that said court was and is a court of record and of general jurisdiction duly created by the laws of said state, and had jurisdiction of said cause and of the parties thereto; that on said date summons was duly issued therein to said defendant which summons with a copy of the complaint in said action was duly served on the defendant in said state on the ——— day of ———, 19—; that return of service was duly made and the original summons and complaint in said action were filed in the office of the clerk of said court on the ——— day of ———, 19—; that thereafter and on the ——— day of ———, 19—, the defendant duly answered said complaint and set up a counterclaim against the plaintiff, which answer and counterclaim were filed in the office of said clerk on said last mentioned date; that thereafter the plaintiff duly made reply to the answer and counterclaim of the defendant, which reply was duly filed in the office of said clerk on the ——— day of ———, 19—; that said cause duly came on for trial in the ——— circuit of said court, and was tried on the ——— day of ———, 19—, at which trial the jury rendered a verdict against the defendant and for the plaintiff for $———, which verdict was certified by the presiding judge of said court by postea filed in the office of the said ——— court on ———, 19—; that thereupon said court duly and regularly ordered judgment with costs upon said postea by order entered ———, 19—; that thereafter and on ———, 19—, judgment was duly rendered in said court in favor of the plaintiff and against the defendant for the said sum of ——— dollars, with costs taxed at ——— dollars, making a total judgment so entered of ——— dollars; that said judgment remains in said court in full force and effect and unsatisfied and unreversed, and no part of said judgment has been paid but the same and all thereof remains due, owing and payable from the defendant to the plaintiff together with interest at ——— per cent. per annum from the said ——— day of ———, 19—.

That a complete exemplified copy of the summons, complaint, return of service, answer and counterclaim, reply, postea, order for judgment, and final judgment in the said action, duly exemplified under the act of Congress appertaining thereto by ———,

clerk, and the Honorable ———, Chief Justice of said court, are attached hereto and made a part hereof and marked Exhibit A.

Wherefore plaintiff demands judgment against the defendant for the sum of ——— dollars, with interest thereon at the rate of ——— per cent. per annum from ———, 19—, and for his costs of this action. X. Y., Attorney for Plaintiff.

(Verification.)

(Attach exhibits.)

§ 569. Form and manner of allegations

Common-law forms of action have been abolished by statute in this state, but common-law causes of action have not been abolished, and under the Code the plaintiff need only state the facts constituting his cause of action in ordinary and concise language without repetition.[62]

A pleading need not state facts to bring the cause under any particular form of action, but is sufficient if it clearly states facts from which the court may see that plaintiff is entitled to relief.[63]

[62] Eggleston v. Williams, 30 Okl. 129, 120 P. 944.

[63] Kee v. Satterfield, 46 Okl. 660, 149 P. 243.

It is not necessary that the petition should contain a statement of facts, stated in such manner as would have been necessary to entitle the plaintiff to a recovery under any particular form of action prior to the adoption of the Code. It is sufficient if such facts are alleged as show a legal or equitable right to a recovery by the plaintiff against the defendant under the general principles of law or equity determining the rights of parties. Hawkins v. Overstreet, 54 P. 472, 7 Okl. 277.

A petition that alleged that the plaintiff was induced by the fraudulent and untruthful misrepresentations of the defendant to buy from him and pay for the capital stock of a corporation, the same being utterly valueless, and that the defendants knew at the time they made the representations of the untruthfulness thereof, and that the plaintiff, relying upon such statements, parted with his money, and bought stock, states but one cause of action sounding in tort; and it was error for the court, upon demurrer being presented by the defendants to the evidence of the plaintiff in support thereof, to require the plaintiff to state or say by what common-law name be denominated his cause of action. Freeman v. Trickett, 49 P. 672, 6 Kan. App. 83.

A petition alleging facts showing that plaintiff had been wronged by defendant, and what such wrong consisted in, and the amount of damages, and that defendant was liable therefor, and asking judgment for such amount, states a cause of action under the rules of Code pleading and Rev. Laws 1910, § 4737, relative thereto. Smith v. Gardner, 131 P. 538, 37 Okl. 183.

Petition, in action on an account drawn upon theory of rescission of debt-

A petition must be framed on a distinct theory, and where it is not so drawn, or there is confusion of theories, so that the court cannot determine upon which a recovery is sought, the petition is insufficient.[64]

§ 570. —— Election

An allegation in conversion that, when property was taken, it was of a specified value, is not an election by plaintiff to claim as the measure of damages the property's value at the time, with interest, rather than the highest market value between the conversion and verdict, without interest.[65]

§ 571. —— Contractual conditions precedent—Form

"In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegations be controverted, the party pleading must establish, on the trial, the facts showing such performance." [66]

CLAUSE OF PETITION—CONTRACTUAL CONDITIONS PRECEDENT

And plaintiff further says that, relying upon the contract and agreement so made as aforesaid, and with the consent of said defendant, he went into possession of said lot and commenced to build a stone building for the purpose of selling groceries therein; that he made contracts for stonework and other materials for said buildings at a great expense and outlay to himself, and spent ——— days' time in getting said material and labor together and contract made for the erecting of said building; and plaintiff says that after he had made said contract and purchased said ma-

or's constructive delivery of goods in satisfaction of claim, held good against demurrer on the ground that petition stated a cause of action for conversion, since plaintiff should be given whatever relief facts entitle him to, even if he has misconceived their legal effect. United States Tire Co. v. Kirk, 102 Kan. 418, 170 P. 811.

[64] Grentner v. Fehrenschield, 68 P. 619, 64 Kan. 764.

[65] Funk v. Hendricks, 105 P. 352, 24 Okl. 837.

[66] Rev. Laws 1910, § 4773.

Where plaintiff alleges that he has performed all the conditions precedent on his part, such allegation is sufficient to tender the issue to the defendant. Milwaukee Mechanics' Ins. Co. v. Winfield, 51 P. 567, 6 Kan. App. 527.

terial and commenced work on said building, the said defendants stopped this plaintiff in his work, and refused to make said lease in writing, and told this plaintiff they would not execute said lease, and then and there refused to comply with their agreement; and thereupon said defendants went into possession of said lot and have so continued ever since, to the great damage of this plaintiff in time, labor and money, materials, etc., in the sum of ——— dollars.

§ 572. —— Instrument for payment of money—Private statute—Form

"In an action, counterclaim or set-off, founded upon an account, promissory note, bill of exchange or other instrument, for the unconditional payment of money only, it shall be sufficient for a party to give a copy of the account or instrument, with all credits, and the indorsements thereon, and to state that there is due him, on such account or instrument, from the adverse party, a specified sum, which he claims, with interest. When others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties in the action, it shall be necessary to state, also, the kind of liability of the several parties, and the facts, as they may be, which fix their liability." [67]

"In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title, and the day of its approval, and the court shall thereupon take judicial notice thereof." [68]

SUIT ON ONE OR MORE NOTES, AND TO FORECLOSE A MORTGAGE SECURING SAME—PARTNERSHIP AGAINST CORPORATION

(Caption.)

Petition

Come now the said plaintiffs, and file their petition against the said defendant, and state:

That the plaintiffs, A. B., C. D., and E. F., are and continuously during all the times herein mentioned have been a partnership, doing business under the firm name of B., D. & Co.

[67] Rev. Laws 1910, § 4774. [68] Rev. Laws 1910, § 4775.

That the said defendant, G., H. & Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oklahoma.

First Cause of Action

For their first cause of action against the said defendant, plaintiffs allege and state:

That on the ——— day of ———, 19—, at ———, the said defendant, as such corporation, by its agent duly authorized thereunto, for a good and valuable consideration, made, executed, and delivered to these plaintiffs, its promissory note in writing, dated on that day, whereby it promised to pay to the order of plaintiffs, under their firm name of B., D. & Co., $———, ——— months after date thereof, together with interest thereon at the rate of ——— per cent. per annum from date until paid; that said note further provided that if the same should be placed in the hands of an attorney for collection, there should become due thereon the further sum of $——— as attorneys fees.

A copy of said note, together with all indorsements thereon, is hereto attached, marked "Exhibit A," and made a part hereof as fully as though set out in full herein.

That no part of said note has been paid, except the sum of $———, and that there remains due and unpaid thereon from defendant to plaintiffs, the sum of $———, together with interest thereon from the ——— day of ———, 19—, and $——— attorney's fees.

Wherefore plaintiffs pray judgment against the said defendant, G., H. & Co., on their first cause of action, for the sum of $———, together with interest thereon at the rate of ——— per cent. per annum from the ——— day of ———, 19—, and for the further sum of $——— as attorney's fees, and for costs and all other proper relief.

Second Cause of Action.

For their second cause of action against the said defendant, plaintiffs allege and state:

(Continue as in first cause of action, describing second note.)

Third Cause of Action.

For their third cause of action against the said defendant, plaintiffs allege and state:

That at the time of executing and delivering said notes set out in plaintiffs' first and second causes of action, and to secure the payment thereof and interest and attorney's fees thereon as mentioned in said notes, according to the tenor thereof, the said defendant, as such corporation, by its agent duly authorized thereunto, duly made, executed, and delivered to these plaintiffs its certain mortgage in writing, whereby it granted, sold, and conveyed unto these plaintiffs the following described premises, to wit: (Fill in description of property.)

That said mortgage contained a proviso in substance the same as the aforesaid condition of the said notes and with power and authority, in case of default as aforesaid in the payment of the said sum of money, or any part thereof, or of the interest thereon, to sell the said mortgaged premises in due form of law, and out of the moneys arising from the sale thereof to pay the said sum of money, and interest, and attorney's fees, with the costs and expenses of the proceedings thereupon, rendering the overplus, if any, to the said mortgagor.

That the said mortgage was duly recorded in the office of the county clerk of ——— county, state of Oklahoma, on the ——— day of ———, 19—, in Book ———, at page ———.

A copy of said mortgage is hereto attached, marked "Exhibit C," and made a part hereof as fully as though set out in full herein.

That the said defendant has failed to comply with the condition of said notes and mortgage by omitting to pay the same when it became due and payable, and that there is justly due to the plaintiffs upon said notes and mortgage the sum of $———, with interest thereon at the rate of ——— per cent. per annum from the ——— day of ———, 19—, and $——— attorney's fees.

Wherefore plaintiffs pray judgment against the said defendant on their third cause of action, foreclosing plaintiffs' lien upon said property, and that said defendant may be forever barred and foreclosed of all right, claim, lien, and equity of redemption in the said mortgaged premises, to wit: (Fill in description of premises;)

that the said premises may be decreed to be sold according to law; that the moneys arising from the sale may be brought into court, and that the plaintiff may be paid the amount due on the said notes and mortgage, with interest to the time of such payment, attorney's fees, the expenses of the sale and the costs and expenses of this action, so far as the amount of such moneys properly applicable thereto will pay the same; and that the defendant may be adjudged to pay any deficiency which may remain, after applying all of said moneys so applicable thereto, and that the plaintiff may have such other and further relief in the premises as shall be just and equitable.

———, Attorneys for Plaintiffs.

(Attach as exhibits copies of notes and mortgage.)

AFFIDAVIT—CONTRACT NOT USURIOUS

State of Oklahoma, } ss.:
County of ———. }

———, of lawful age, being first duly sworn, on oath, says: That he is the one of the plaintiffs above named; that he has read the above and foregoing petition, and knows the contents thereof; that the notes and mortgage sued on were not made in violation of the interest laws of this state, and that a greater rate of interest than ten per cent. has not been charged, reserved, or collected on such notes sued on. (Signature.)

Subscribed and sworn to before me this ——— day of ———. 19—. (Signature.)

Note.—This affidavit is required to be filed with the petition in suits on contracts of $300 or less, in order to give the court jurisdiction.[69]

§ 573. —— Libel or slander—Form

"In an action for libel or slander, it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff; and if the allegation be denied, the plaintiff must prove, on the trial, the facts, showing that the defamatory matter was published or spoken of him." [70]

[69] Sess. Laws 1916, c. 20, § 4, p. 27; Bunn's 1918 Supp. to Rev. Laws, § 1005c.

[70] Rev. Laws 1910, § 4776.

Averments to show that defamatory words not actionable on their face

Where words are libelous per se, an innuendo is unnecessary.[71]

Where the published article is not libelous per se, plaintiff must plead facts showing special damages.[72]

It is not necessary to allege malice in the publication of a slander.[73]

PETITION IN ACTION FOR LIBEL OR SLANDER

(Caption.)

Comes now the said plaintiff, A. B., and for cause of action against the defendant, C. D., alleges and states:

1. That plaintiff is a resident and inhabitant of the county of ———, in the state of Oklahoma, living near ———, in said county, where he has resided for a number of years last past; that he

derive their defamatory import from extrinsic facts and circumstances must be applied to plaintiff by a proper colloquium with the intended and understood meaning correctly set out in the innuendoes. Kee v. Armstrong, Byrd & Co., 75 Okl. 84, 182 P. 494, 5 A. L. R. 1349. A "colloquium" only serves to show that the words were spoken in reference to the matter of the averment. Id.

Averments to show that defamatory words not actionable on their face derive their defamatory import from extrinsic facts and circumstances must be applied to plaintiff by a proper colloquium with the intended and understood meaning correctly set out in the innuendoes. Kee v. Armstrong, Byrd & Co., 75 Okl. 84, 182 P. 494, 5 A. L. R. 1349. An "innuendo" is only explanatory of the subject-matter sufficiently expressed before, and is and can be only explanatory thereof, and cannot extend sense of words beyond their own meaning unless something is put upon the record for it to explain, nor can it make a thing certain which is in fact uncertain, nor enlarge or restrict the meaning of words, nor introduce new matter. Id.

If alleged defamatory words are not actionable on their face but derive their defamatory import from extrinsic facts and circumstances, such facts and circumstances must be distinctly set forth in the inducement and connected with words charged by a proper averment, and such words may be made to appear actionable by averring extrinsic facts showing that they were intended to be slanderous and were so understood. Kee v. Armstrong, Byrd & Co., 75 Okl. 84, 182 P. 494, 5 A. L. R. 1349. An "inducement" is a statement of facts out of which the charge arises, or which is necessary or useful to make the charge intelligible, or, in other words, it is intended to state facts whereby the libel or slander is rendered intelligible, and is shown to contain an injurious imputation. Id. Where a petition in an action for libel failed to connect the publication of words not actionable per se with any extrinsic facts and circumstances which would make them libelous, it did not state a cause of action. Id.

[71] Kee v. Armstrong, Byrd & Co. (Okl.) 151 P. 572.

[72] McKenney v. Carpenter, 141 P. 779, 42 Okl. 410; Nunnery v. Bailey (Okl.) 166 P. 82, L. R. A. 1917F, 548; N. S. Sherman Mach. Co. v. Dun, 114 P. 617, 28 Okl. 447.

[73] Smith v. Gillis, 51 Okl. 134, 151 P. 869.

is a farmer by occupation, but is not the owner of land, but is the renter of land.

2. That on the ——— day of ———, 19—, the said defendant, wickedly intending to injure the plaintiff in his good name and reputation, accosted the said plaintiff in the village of ———, Oklahoma, in the presence of divers and numerous persons, and in their hearing falsely and maliciously did speak and publish of and concerning the said plaintiff false and defamatory words as follows: "Say, A. (meaning this plaintiff), do you (meaning this plaintiff) steal corn?" That when said defendant accosted your said plaintiff in that manner, your said plaintiff considered that the said defendant was joking, and that he thereupon jokingly replied: "Yes, I steal corn every day if I can." That the defendant thereupon continued, and your said plaintiff then observed that the said defendant was angry, and was not joking nor jesting in the manner as plaintiff first supposed. That said defendant thereupon said: "Well, we had some corn stolen (meaning thereby that he and his brother had had some of their corn stolen)." That your said plaintiff replied, saying: "Well, you (meaning defendant) don't mean to say that I stole your corn, do you?" That defendant then replied to said plaintiff, saying: "I mean just what I say." To which your said plaintiff replied, saying to said defendant: "C. (meaning defendant), you (meaning defendant) don't accuse me of that, do you?" That thereupon the said defendant replied, saying: "There is very strong evidence that you (meaning plaintiff) did." That all of this conversation and false and defamatory charges were made by said defendant of and concerning plaintiff in a public and angry and insolent manner, in the presence and hearing of divers persons, who understood the same, and that by the words aforesaid the said defendant then and thereby publicly charged the said plaintiff with stealing corn from their premises. That said charge was wholly false and unfounded, and was so spoken and published by the said defendant to the great and lasting injury of your said plaintiff.

Wherefore plaintiff prays judgment for the sum of ——— dollars, and for costs of this action, and all other proper relief.

X. Y., Attorney for Plaintiff.[74]

[74] See Thorman v. Bryngelson, 87 Neb. 53, 127 N. W. 117.

§ 574. Construction and operation

The nature of a suit is to be determined in the first instance by the allegations of the petition, and not from its caption.[75]

All the facts pleaded will be considered in determining the sufficiency of a petition;[76] but the words "a corporation," in the caption, cannot be construed as an allegation of incorporation.[77]

Where a petition states a good cause of action for breach of contract, the addition of words or averments appropriate to a cause of action for a wrong will not change the action from contract to tort.[78]

Where it is doubtful whether a petition states a cause of action ex contractu or ex delicto, the courts are inclined against construing it as stating a cause of action ex delicto.[79]

A corporation, in bringing suit, need not allege its incorporation, and its legal capacity to sue will be presumed until the contrary appears.[80]

In an action founded on either contract or tort, plaintiff is not required to state on which he relies, and, if he should make such a statement and be mistaken, the statement would be immaterial.[81]

[75] Dodd-Lear Hardwood Lumber Co. v. Gyr, 44 Okl. 630, 146 P. 16.

[76] Where, in ejectment, the plaintiff in setting forth statutory requirements in addition thereto sets out the source of title of each of the parties, and a demurrer is filed to such pleading, all of the facts pleaded will be considered in determining its sufficiency. Jones v. Carnes, 87 P. 652, 17 Okl. 470.

[77] The words "a corporation," appearing in the title of a case after the name of plaintiff, are descriptive of the plaintiff, and cannot be construed to be an allegation of incorporation. Boyce v. Augusta Camp. No. 7429, M. W. A., 78 P. 322, 14 Okl. 642.

[78] Missouri, K. & T. Ry. Co. v. Hutchings, Sealy & Co., 78 Kan. 758, 99 P. 230.

[79] Id.

In determining whether a petition states a cause of action ex contractu or ex delicto, it must be considered in its entirety, but with special reference to its prominent and leading allegations. Delaney v. Great Bend Implement Co., 98 P. 781, 79 Kan. 126. Where the averments make it doubtful whether the action is on contract or in tort, every intendment must be made in favor of construing it as an action on contract. Id.

The allegations and prayer of the pleadings should be looked to in determining whether a claim for damages is based on contract or tort, and every doubt should be resolved in favor of it being based on contract. Stringer v. Kessler, 56 Okl. 50, 155 P. 867.

[80] Leader Printing Co. v. Lowry, 59 P. 242, 9 Okl. 89.

[81] Cockerell v. Henderson, 105 P. 443, 81 Kan. 335, 50 L. R. A. (N. S.) 1.

Plaintiff need not negative contingencies in a contract sued on, the happening of which would operate in defendant's favor.[82]

A petition is sufficient where the facts alleged clearly negative exceptions by inference alone and not specifically.[83]

§ 575. Requisites and sufficiency

The rules of pleading become clearer from an examination of the illustrations contained in the notes, from which it appears that the courts have passed upon the sufficiency of allegations of numerous matters involved in actions of various character, such as: Negligence in maintaining bridges,[84] railroad embankments,[85] streets,[86] and nuisances,[87] and in providing for the safety of employés;[88] as-

[82] Minnetonka Oil Co. v. Cleveland Vitrified Brick Co., 48 Okl. 745, 150 P. 712.

[83] Midland Valley R. Co. v. Hardesty, 38 Okl. 559, 134 P. 400.

[84] A petition stating that a town negligently permitted one of its bridges to remain out of repair, in consequence of which an animal was injured, held to state a cause of action, though it did not state in terms that the city had actual or implied knowledge of the defects. Town of Sallisaw v. Ritter, 142 P. 391, 42 Okl. 626.

[85] A petition which alleges, substantially, that defendant's railway runs through plaintiff's lands on an embankment, that defendant has failed to establish and maintain proper openings for the outlet of surface water falling on and flowing over said lands, and caused to be filled up a natural water course across said lands, which caused the surface water to stand and back up on plaintiff's crops growing on said lands, to his damage, states a cause of action for obstruction of a water course, and not for damage by surface water only. Chicago, R. I. & P. Ry. Co. v. Maynard, 122 P. 149, 31 Okl. 685.

[86] Petition, alleging that plaintiff's horses hitched to buggy were frightened by children on roller skates, that city had permitted street to remain in an unsafe condition and that buggy fell into hole and injured plaintiff, held to state cause of action. City of Cushing v. Stanley (Okl.) 172 P. 628.

[87] In an action against a city and a private person for damages resulting from a nuisance in an alley, plaintiff alleged as her cause of action that defendant permitted the nuisance to be constructed and maintained in the alley; and that "the defendants and each of them failed, neglected, and refused to abate such nuisance when notified to do so." Held, that the petition sufficiently alleges notice to the city of the existence of the nuisance, and negligence on its part thereafter in removing same, to be good against a demurrer. City of Pawhuska v. Rush, 119 P. 239, 29 Okl. 759.

A petition charging that a city's line of sewer extended through plaintiff's crops, that it negligently permitted surface water to be discharged on the crops, destroying them, and had disallowed plaintiff's claim for damages, states a cause of action as against a general demurrer. City of Chickasha v. Looney, 128 P. 136, 36 Okl. 155.

[88] It was not error to refuse to strike from a petition an allegation of general custom among others in the same business as to places for work or meth-

sumption of risk;[89] proximate cause;[90] damages in general;[91] damages from breach of contract,[92] breach of promise,[93] or

ods, as bearing on master's exercise of due care. Missouri, O. & G. Ry. Co. v. Overmyre, 58 Okl. 723, 160 P. 933.

A petition, alleging negligence in the use of defective machinery and the giving of orders by obeying which the servant received injuries held to state a cause of action. Enid Electric & Gas Co. v. Decker, 128 P. 708, 36 Okl. 367.

[89] An allegation in a petition for injuries due to the falling of a water tank placed by defendant in plaintiff's kitchen held not to amount to a confession of knowledge of the defective condition of the tank so as to import an assumption of the risk of injury therefrom. Moore v. Johnson, 136 P. 422, 39 Okl. 587.

[90] In an action by a servant for personal injuries, petition held to allege that acts of negligence of master were the proximate cause of the accident in which plaintiff was injured. Ferris v. Shandy (Okl.) 174 P. 1060.

[91] A petition alleged that plaintiff was about to commence an action for alimony against her husband, who was then within the jurisdiction of the court; that he was possessed of property of the value of $7,000, but did not state where the property was situated, or that the defendant was a resident of the state; that defendant, who was the district judge of the court where the action was about to be commenced, advised the husband to withdraw from the jurisdiction of the court, and to dispose of his property; that subsequently she brought her action, and obtained a judgment against him for $1,500; that the execution issued thereon was returned unsatisfied. Held, that the petition did not state a cause of action, because of the uncertainty of plaintiff's damage. Harrison v. Redden, 36 P. 325, 53 Kan. 265.

Petition alleging increased depth of stream caused by obstruction, destroying use of road across stream and valuable sand beds, with resulting damage, held not demurrable. Zalaback v. City of Kingfisher, 59 Okl. 222, 158 P. 926.

Where the petition in an action for damages shows that plaintiff has sustained a detriment as defined by Rev. Laws 1910, § 2845, and the amount thereof, that defendant wrongfully caused same, and that it is a detriment for which the law affords redress, it states a cause of action. Midland Valley R. Co. v. Larson, 138 P. 173, 41 Okl. 360.

A petition in an action by an oil and gas lessor for injuries to the surface rights held to state a cause of action. Pulaski Oil Co. v. Conner, 62 Okl. 211, 162 P. 464, L. R. A. 1917C, 1190.

[92] Where the petition alleged that making of an enforceable contract for the carriage of goods, and alleged defendant's breach resulting in plaintiff's damage, such petition is good as against general demurrer. St. Louis & S. F. R. Co. v. Wm. Bondies & Co., 64 Okl. 88, 166 P. 179.

A petition in replevin held not demurrable, though it did not specifically allege breach of conditions of a chattel mortgage, where the attached copy of the mortgage showed such breach. Dabney v. Hathaway, 51 Okl. 658, 152 P. 77.

Petition in an action for breach of two builders' contracts, whereby plaintiff was forced to pay lien claimants, held to state a cause of action. Antene v. Jensen, 47 Okl. 352, 148 P. 727.

[93] A petition in an action for breach of promise to marry held sufficient. Waddell v. Wallace, 121 P. 245, 32 Okl. 140, Ann. Cas. 1914A, 692.

death;[94] personal injuries in general;[95] assault;[96] injury to passenger,[97] or shipment;[98] recovery of excessive freight rates;[99]

[94] In an action by a parent to recover for the death of his son, an allegation that he was capable of earning $3 per week, and that by reason of his death plaintiff had been damaged in the sum of $10,000, is sufficient to sustain a verdict. Kansas City v. Siese, 80 P. 626, 71 Kan. 283.

Petition held to state a cause of action for damages from death due to a violation of the Factory Act. Frisco Lumber Co. v. Ethridge, 45 Okl. 566, 146 P. 441.

Petition, in an action for the wrongful death of an employé, held not demurrable, where it clearly charged negligence, though it contained statements from which contributory negligence might be inferred. Duncan Cotton Oil Co. v. Cox, 139 P. 270, 41 Okl. 633.

In an action for the death of a boy from falling into a pit at an abandoned city pumphouse, which pit was filled with water, and covered with a light layer of straw, petition held demurrable. City of Shawnee v. Cheek, 137 P. 724, 41 Okl. 227, 51 L. R. A. (N. S.) 672, Ann. Cas. 1915C, 290.

[95] The allegations of the petition as to plaintiff's injuries held sufficient to authorize proof of the impairment of his earning capacity. Missouri, O. & G. Ry. Co. v. Collins, 47 Okl. 761, 150 P. 142.

A petition for personal injury in a crossing accident, alleging that solely by reason of defendant's negligence, and the negligence of its flagman, sta-

[96] A demurrer to a petition which alleges that defendant at a certain time and place willfully and maliciously beat the plaintiff with a stick or club, causing her great pain, suffering, and mental anguish, to her damage in the sum of $1,000, is properly overruled. Long v. McWilliams, 69 P. 882, 11 Okl. 562.

[97] The petition, in a passenger's action for injuries due to the derailment of a train, held to state a cause of action for negligence. Missouri, O. & G. Ry. Co. v. Vandivere, 141 P. 799, 42 Okl. 427.

A petition stating that the defendant carrier negligently permitted the floor of a passenger car to become in a dangerous condition, to plaintiff's injury, held not demurrable, though it did not state that the carrier knew of the dangerous condition; proof of actual or imputed notice being admissible under it. Missouri, O. & G. Ry. Co. v. Smith, 55 Okl. 12, 155 P. 233.

[98] An allegation in a petition in an action for injuries to live stock shipped under a contract requiring suit within a certain time, that the delay in suing was due to pending negotiations between plaintiff and connecting carriers, held not to state an implied waiver of the contract limitation by the initial carrier. Harrington v. Wichita Falls & N. W. Ry. Co., 56 Okl. 729, 156 P. 634.

[99] A petition against a carrier to recover excessive freight rates, alleging the distance from the starting point to destination, that a certain sum was a reasonable compensation for carrying the commodity over defendant's line for such distance, that defendant wrongfully charged plaintiff a larger sum stated, more than a reasonable charge, which plaintiff was compelled to pay and did pay under protest, and that plaintiff had never consented that the charge was reasonable, but had demanded the return of the excessive and unreasonable part thereof, which had been refused, stated a cause of action. Ft. Smith & W. R. Co. v. Chandler Cotton Oil Co., 106 P. 10, 25 Okl. 82.

trover;[1] malicious prosecution;[2] consideration;[3] the account sued on;[4] rights in replevin of the holder of a chattel mortgage[5] and of

tioned as required by a city ordinance, in being absent from his post and in failing to give any warning, relied upon a violation of the ordinance. Lusk v. Pugh (Okl.) 176 P. 80.

A petition in an action for injuries to a boy alighting from a moving freight train by order of the fireman held to state a cause of action. Chicago, R. I. & P. Ry. Co. v. Matukas, 47 Okl. 302, 147 P. 1038, L. R. A. 1917C, 1066.

Petition in employé's action for injuries held to state a cause of action based on concurring negligence of a fellow servant and of the master. Frisco Lumber Co. v. Spivey, 140 P. 157, 40 Okl. 633.

Petition, in a fireman's action against a city, held to sufficiently state, as against a general demurrer, facts from which it could be inferred that the city had notice of the defects in the street in time to have repaired same with the exercise of reasonable diligence. City of Ardmore v. Fowler, 54 Okl. 77, 153 P. 1117.

A petition in a pedestrian's action for injuries from a defective sidewalk held not subject to general demurrer, where it alleged that the city unlawfully and negligently permitted the sidewalk to remain unsafe, open, and unguarded. City of Woodward v. Bowder, 46 Okl. 505, 149 P. 138.

[1] A petition in trover states a cause of action when it alleges that plaintiff was the owner of the property in question, describing it, and alleging its value, and that defendants wrongfully took and converted it to their own use. Robinson v. Peru Plow & Wheel Co., 31 P. 988, 1 Okl. 140.

[2] A petition in an action for malicious prosecution, alleging that a prosecution was commenced against plaintiff, that it was instituted by defendants, that it was malicious and without probable cause, and that it has been finally terminated in plaintiff's favor, states a cause of action. Schrieber v. Clapp, 74 P. 316, 13 Okl. 215.

[3] The petition in an action for the balance due on an account for material used in repairs on a building and alleging a novation held to plead a consideration under Rev. Laws 1910, § 926. Martin v. Leeper Bros. Lumber Co., 48 Okl. 219, 149 P. 1140.

[4] A petition drawn under Rev. Laws 1910, § 4774, authorizing the use of a short form of an account in an action on account, held to substantially comply with the requirements of such statute, so that it was not error to overrule a demurrer and an objection to the introduction of any evidence. Mooney v. First State Bank of Washington, Okl., 48 Okl. 676, 149 P. 1173.

[5] A petition which bases the right of plaintiffs' recovery upon their special ownership in property under a chattel mortgage, and which contains the usual allegations of such pleading in replevin, and alleges the conditions of the note so secured have been broken, is not subject to the objection that it is insufficient to state a cause of action because it does not state that the note has not been paid, or the amount due thereon. Swope v. Burnham, 52 P. 924, 6 Okl. 736.

A petition in replevin to recover possession of chattels embraced in a chattel mortgage, for the purpose of enabling the mortgagee to enforce his lien, and which sets out the mortgage and shows by independent averments that the particular property sought to be recovered is not the property embraced in a prior chattel mortgage covering some of the property embraced in plain-

the lessee;[6] action against stockholders;[7] interest;[8] bonds;[9] in-

tiff's mortgage, is not subject to the objection on demurrer that the petition does not show right of possession in the plaintiff. Payne v. McCormick Harvesting Mach. Co., 66 P. 287, 11 Okl. 318. Where the plaintiff claims the right to possession of property by virtue of the lien created by a chattel mortgage, under the general denial the defendant is entitled to show that the mortgage was obtained by fraud or deception, and thus defeat the lien, and consequently the right of possession in the mortgagee. Id.

In replevin by a mortgagee, the petition is not subject to general demurrer because it fails to allege condition broken in the mortgages, and that the notes were due, since the mortgages were attached to the petition and made a part thereof, and contain copies of the notes showing that they were past due when suit was brought, and a condition that on default the mortgagee was entitled to possession. Whiteacre v. Nichols, 87 P. 865, 17 Okl. 387.

[6] Petition in replevin by lessee held to show that the building in controversy was personal property, removable under Rev. Laws 1910, § 6749. Welch v. Church, 55 Okl. 600, 155 P. 620.

[7] A petition against a stockholder by a trustee in bankruptcy of a corporation for par value of stock for which defendant had transferred lease containing covenant against assignment, held insufficient to state a cause of action. Chilson v. Cavanagh, 61 Okl. 98, 160 P. 601, L. R. A. 1918D, 1044.

Petition, in a stockholder's action against a corporation and other stockholders and officers to rescind a sale of stock formerly owned by plaintiff and sold to the individual defendants and to secure a reissuance of the stock to plaintiff, held insufficient to show a right to the relief sought. Checotah Hardware Co. v. Hensley, 141 P. 422, 42 Okl. 260. Where the directors of a corporation are guilty of a breach of trust injurious to the corporate assets and to shareholders and the corporation refuses to sue to redress such injuries, one or more shareholders may proceed in their individual names. Id. Petition in a stockholder's action for redress for breaches of trust injurious to the corporate assets and plaintiff's right held demurrable, where it did not clearly show that a demand on the defendant directors to enforce the rights of the corporation would have been refused. Id.

Amended petition, in action by bank commissioner to recover double liability, imposed by Rev. Laws 1910, § 265, upon a stockholder of insolvent state bank, held to state a cause of action. Blackert v. Lankford (Okl.) 176 P. 532.

Complaint in equity where a receiver joined subscribers to the capital stock of a bank as defendants to recover unpaid subscriptions, which alleges that the judge who appointed the receiver on application of creditors supported

---

[8] Where an itemized account, showing when the several items were purchased, and the time when the purchases were to be paid for, is attached to and made a part of the complaint, a prayer asking for judgment for the principal sum, together with interest according as the same may appear to be due from the account, is sufficient to support a verdict for the principal sum with interest from the date on which each payment became due to the date of the verdict. Dunham v. Holloway, 41 P. 140, 3 Okl. 244, judgment affirmed Holloway v. Dunham, 18 S. Ct. 784, 170 U. S. 615, 42 L. Ed. 1165.

[9] See note 9 on following page.

surance;[10] money had and received;[11] ejectment;[12] avoiding

by a showing that the bank was insolvent and without assets entered an order directing the receiver to retain counsel and sue defendants as subscribers on their unpaid subscriptions, or for the stock issued to them for the benefit of all the creditors, and that the suit is filed under such order, warrants the court to treat such suit as brought by the creditors of the insolvent bank, over which equity has jurisdiction, and in which all the subscribers may be joined as defendants. Dill v. Ebey, 112 P. 973, 27 Okl. 584, 46 L. R. A. (N. S.) 440.

A petition in an action against a stockholder for attorney's fees for services rendered in an action instituted by him in a federal court in behalf both of himself and the corporation construed as to the relief sought. Colley v. Sapp, 44 Okl. 16, 142 P. 1193, affirming judgment on rehearing 44 Okl. 16, 142 P. 989.

[9] In an action on a constable's bond for a wrongful seizure and sale of property under an attachment, a petition alleging that part of the property levied on, to wit, 500 bushels of wheat, was wasted through the officer's negligence, and that the attached property was sold at private sale, states a cause of action. Holdredge v. McCombs, 56 P. 536, 8 Kan. App. 663.

A petition, in an action on the bond of a firm of abstracters to recover damages by reason of an error in the abstract, stating that plaintiff, relying on the abstract, covenanted to warrant title to his property against the liens of all persons whatsoever, and that in order to protect the property purchased from plaintiff the purchaser was compelled to pay to the clerk of the district court the sum of $216 to prevent the selling of the property under execution, whereby the plaintiff became liable to pay to said purchaser the said sum, does not state facts sufficient to show that plaintiff sustained actual injury. Walker v. Bowman, 105 P. 649; judgment reversed on rehearing 111 P. 319, 27 Okl. 172, 30 L. R. A. (N. S.) 642, Ann. Cas. 1912B, 839.

Petition in an action on a building contractor's bond held to state a cause of action. Gorton v. Freeman, 51 Okl. 516, 152 P. 127.

Petition in an action on a receiver's bond held sufficient as against general demurrer, where it alleged the giving, and facts constituting a breach, of the bond. Nichols v. Dexter, 52 Okl. 152, 152 P. 817.

In action on a receiver's bond, failure to attach to the petition a copy of the order appointing the receiver does not render the petition subject to general demurrer. Nichols v. Dexter, 52 Okl. 152, 152 P. 817.

[10] An allegation in the petition that defendant, a solvent insurance com-

---

[11] Petition held to state a cause of action for money had and received. Martindale v. Shaha, 51 Okl. 670, 151 P. 1019.

[12] A complaint in ejectment under Code 1890, c. 70, art. 32, § 5, is not insufficient in not specifically alleging that plaintiff is entitled to the premises in suit, where it alleges facts leading to that conclusion. Carson v. Butt, 46 P. 596, 4 Okl. 133.

A description in a petition in ejectment of the land sued for held sufficient to support a judgment for plaintiffs on failure to answer. State v. Thomas, 126 P. 1082, 87 Kan. 803.

In an action for possession of land, filed prior to the time when Rev. Laws 1910 became operative, where the petition contained all the allegations required by Snyder's Comp. Laws 1909, § 6122, it is good against a general demurrer. Frazier v. Nichols, 50 Okl. 41, 150 P. 711.

pany, had refused to pay the loss on a policy on demand therefor, held equivalent to an allegation that it had denied liability. American Nat. Ins. Co. v. Donahue, 54 Okl. 294, 153 P. 819.

Petition alleging that defendant received premium for a fidelity bond and signed it, knowing that principal had not signed, and delivered it to plaintiff as a completed instrument, sufficiently alleged defendant's waiver of principal's signature. Oklahoma Sash & Door Co. v. American Bonding Co. (Okl.) 170 P. 511.

Where the petition alleged the property insured was on March 7th located in the building described, and in another paragraph averred its destruction on that day, it will be inferred that the pleader intended to allege the property was so located at the time of the fire. German-American Ins. Co. of New York v. Lee, 51 Okl. 28, 151 P. 642.

Pleadings in action on insurance policy held to sufficiently plead facts constituting waiver by defendant of forfeiture through breach of warranties contained in the policy. Insurance Co. of the State of Pennsylvania v. Harris, 49 Okl. 165, 152 P. 359.

An allegation "that defendant refused payment" held equivalent to an allegation "that defendant denied liability," when applied to a solvent insurance company. Continental Ins. Co. v. Chance, 48 Okl. 324, 150 P. 114.

Petition, in an action on a bond guaranteeing against embezzlement by an employé held to sufficiently allege the embezzlement. Oklahoma Sash & Door Co. v. American Bonding Co. (Okl.) 153 P. 1151.

Assured's allegation in his pleading that he failed to perform the conditions of the policy because of ignorance of same held not to excuse him, where there was no allegation of fraud, misrepresentation, or concealment. Brown v. Connecticut Fire Ins. Co., of Hartford, Conn., 52 Okl. 392, 153 P. 173. An allegation that the existence of mortgages on the insured property in violation of a forfeiture clause did not contribute to the loss held not to state facts relieving plaintiff from violating the policy so as to entitle him to recover. Id.

Insured claiming right under Rev. Laws 1910, § 984, to rescind contract substituting policies with separate loan agreement was not required to allege false representations inducing execution of separate agreement, so that sustaining of general demurrer to petition was reversible error. Myler v. Fidelity Mut. Life Ins. Co. of Philadelphia, 64 Okl. 293, 167 P. 601.

Petition by insured to rescind contract substituting insurance policies with separate loan agreement, alleging that he did not have actual knowledge of loan agreement until ten years thereafter, did not show such laches as to be vulnerable to a general demurrer. Myler v. Fidelity Mut. Life Ins. Co. of Philadelphia, 64 Okl. 293, 167 P. 601.

A petition, alleging that the loss occurred when the policy was not in force, held demurrable. I. Friedman Co. v. Harn, 48 Okl. 694, 150 P. 680.

Petition in an action on an indemnity bond not signed by the employé held not demurrable, where it alleged facts constituting a waiver of a condition of the bond, requiring the employé's signature to the bond. Oklahoma Sash & Door Co. v. American Bonding Co. (Okl.) 153 P. 1151.

In an action on a fire policy, a petition alleging that the defendant knew that the fee simple to the land on which the insured building was situated was in the Choctaw and Chickasaw Tribes of Indians, and that the condition of the policy as to sole and unconditional ownership was waived, states a

statute of frauds;[13] subrogation;[14] equity in general;[15] foreclosure;[16] enjoining foreclosure[17] or collection of assessments;[18] grounds for injunction;[19] offer to restore;[20] rescission and cancellation;[21] reformation of instruments;[22] divorce;[23] judgments;[24] trusts,[25] and specific performance.[26]

cause of action. Conley v. Northwestern Fire & Marine Ins. Co., 127 P. 424, 34 Okl. 749.

The petition in an action on an accident policy held to sufficiently allege compliance with the terms of the policy so as to authorize the introduction of evidence thereunder. Continental Casualty Co. v. Wynne, 129 P. 16, 36 Okl. 325.

[13] Plaintiff's bill of particulars demanding in the language of Rev. Laws 1910, § 2860, $199.50 as "the excess * * * of the value * * * to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled," and disclosing that defendant had not subscribed any note or memorandum of the contract, as required by statute of frauds (Rev. Laws 1910, § 941), held to state no cause of action. Altoona Portland Cement Co. v. Burbank, 44 Okl. 75, 143 P. 845.

A petition alleging, in substance, that defendant is indebted to plaintiff in a specified sum, the agreed price of a specified quantity of coal, which "coal was sold and delivered to the defendant at the special instance and request of the defendant, and the same was received by the defendant and used by him and converted to his own use," is not subject to demurrer on the ground that the contract was verbal, and within the statute of frauds. Taylor v. Canadian Coal Co., 122 P. 163, 31 Okl. 601.

Petition held not to fail to state a cause of action under statute of frauds by reason of alleged contract being in parol. McCoy v. McCoy, 121 P. 176, 30 Okl. 379, Ann. Cas. 1913C, 146.

In an action to recover the contract price of certain machinery, a petition which states that the same on parol order of defendant was shipped by rail by plaintiff's principal to a third person at a certain place, and there delivered as per order for and on behalf of the defendant, and which had been ordered through and paid for by plaintiff, states a contract void under the statute of frauds, in that it fails to state that the machinery was accepted or received by the purchaser. Tinkelpaugh-Kimmel Hardware Co. v. Minneapolis Threshing Mach. Co., 95 P. 427, 20 Okl. 187.

[14] Petition against contractor by owner for amounts due subcontractors for which liens might be obtained is demurrable where owner has not been subrogated to rights of subcontractors, and they have taken no steps looking to establishment of liens. Bunker v. Haskett, 56 Okl. 545, 156 P. 347.

[15] A petition, averring defendant claims some right, title, or interest, but that, if he has any, the same is inferior and subject to plaintiff's lien, states facts sufficient to constitute a cause of action, and to support a decree against such defendant. Horton v. Haines, 102 P. 121, 23 Okl. 878.

Where, in an action by a person to be adjudged the rightful owner of land, because of a mistake of law of the land office in deciding adversely to him in a contest, the court properly sustained a demurrer to a petition which showed on its face that a patent was not issued. Jordan v. Smith, 73 P. 308, 12 Okl. 703.

[16-26] See notes 16 to 26 on pages 418 to 421.

[16] A petition, in an action to foreclose a mortgage on an oil and gas lease in the Osage Nation, held to state a cause of action. Davis v. Moffett, 144 P. 607, 43 Okl. 771.

In suit on note and to foreclose chattel mortgage, petition in intervention, alleging that mortgagor delivered to intervener notes secured by his chattel mortgage duly acknowledged and recorded, and asking to have its lien declared superior to plaintiff's, stated a cause of action, where the mortgage set up by plaintiff was void on its face as to intervener. Guarantee State Bank v. Moore, 63 Okl. 133, 163 P. 272.

The petition, in an action to foreclose a mechanic's lien for material furnished to a builder before his discharge by the lessee and subsequently used by the lessee in the building, held to state a cause of action entitling plaintiff to enforce his lien against the lessee the same as though he were an original contractor with an owner. C. E. Sharp Lumber Co. v. Kansas Ice Co., 142 P. 1016, 42 Okl. 689.

In action on note secured by maker's individual mortgage upon "all her interest" in a quarter section, alleging that other defendants claimed some interest in land, and asking that they appear and assert their claim, stated a cause of action. Neil v. Union Nat. Bank of Chandler (Okl.) 178 P. 659.

Petition in foreclosure held to allege that the interest claimed by certain defendants extended to all the property and was derived from the mortgagor since the execution of the mortgage. De Watteville v. Sims, 44 Okl. 708, 146 P. 224.

[17] A petition to restrain a sale on foreclosure, on the ground that plaintiffs had a superior equity in the property because of certain mortgages held by them on the property, that defendants would not recognize the claims of plaintiffs and that if defendant sold the property, it would pass into the hands of innocent purchasers, is subject to demurrer, as plaintiffs could in the foreclosure suit show that the foreclosure was not in conformity to law, and had the judgment in such suit been against them, they could have brought error, and have saved any right that might, in that case, have been taken away from them. Perdue v. United States Fidelity & Guaranty Co., 39 Okl. 168, 134 P. 438.

Petition in landlord's suit against tenant and his mortgagee to enjoin foreclosure of chattel mortgage on furniture of hotel, merely alleging lease, tenant's occupation of hotel, and effect of foreclosure, stated no cause of action. Beane v. Rucker (Okl.) 168 P. 1167.

[18] Petition, in an action to enjoin the county treasurer from collecting special assessment warrants and extending tax rolls, held demurrable under Rev. Laws 1910, § 644, where it did not show want of jurisdiction to make the improvements and showed that the action was commenced more than 60 days after the assessment was made. Terry v. Hinton, 52 Okl. 170, 152 P. 851.

Petition, in an action to enjoin a pretended special assessment wrongfully levied against plaintiff's property, held sufficient to state a cause of action. Hoehler v. Short, 140 P. 146, 40 Okl. 681.

A petition against city officials to restrain the collection of special assessments for street improvements is insufficient, where the only acts remaining are to be performed by the county clerk and treasurer. Harn v. Oklahoma City, 47 Okl. 639, 149 P. 868.

[19] Petition in several counts to enjoin county treasurer from selling and

from issuing tax deeds to petitioner's land, alleging his payment of one-half of taxes levied upon part of land before delinquent, its acceptance, and treasurer's refusal to issue a tax receipt and to enter payment, and a tender of other taxes with same result, etc., held to state facts entitling petitioner to injunction. Watkins v. Yell (Okl.) 176 P. 390.

A burial place is not per se a nuisance to a person living in its immediate vicinity, and, if he seeks to enjoin the further use or establishment of a private burial ground near his house, it is not sufficient to allege in general terms probable injury to the health of his family by pollution of the air and water or other injuries, but he must state facts from which the court can clearly see that such consequences will most probably result. Clinton Cemetery Ass'n v. McAttee, 111 P. 392, 27 Okl. 160, 31 L. R. A. (N. S.) 945.

Petition, in suit to enjoin sale of refunding bonds, merely alleging that indebtedness refunded was incurred in violation of Const. art. 10, § 26, and Laws 1910–11, c. 80, does not state facts sufficient to constitute a cause of action. Hume v. Wyand (Okl.) 173 P. 813.

[20] In an action for rescission of a deed obtained in consideration of void corporate stock, an allegation in the petition that plaintiff be charged with so-called dividends received by him and credited with the value of the reasonable use of the lands conveyed was a sufficient "offer to restore," within Rev. Laws 1910, § 986, providing how and when a rescission may be accomplished. Pruitt v. Oklahoma Steam Baking Co., 39 Okl. 509, 135 P. 730.

In an action for rescission and cancellation of a deed fraudulently obtained, an allegation that plaintiffs are ready and willing to execute a deed to the land traded for to defendants is a sufficient offer to restore within Wilson's Rev. & Ann. St. 1903, § 827. Clark v. O'Toole, 94 P. 547, 20 Okl. 319.

An allegation in a bill to set aside a conveyance for fraud preliminary to the contest of a will that if it should be found that the consideration received by plaintiff for execution of the conveyance was not money of testatrix, whose sole heir plaintiff is, but was money of defendant, plaintiffs are willing to do equity, and will upon the establishment of such fact repay such money with interest to defendant, and are willing to have the relief awarded made subject to such repayment within a time to be fixed by the court, is a sufficient offer to do equity. Gidney v. Chappell, 26 Okl. 737, 110 P. 1099.

[21] A petition for decree setting aside transfers of real estate by plaintiff to defendants held to state a cause of action against both defendants. Jones v. Tydings, 123 P. 1063, 31 Okl. 763.

Petition for cancellation of signature to an indemnity bond for forgery held to state a cause of action in equity. National Surety Co. v. Mullen, 50 Okl. 437, 150 P. 873.

In an action to rescind a contract for fraud, a petition showing the acts of fraud, and that plaintiff acted upon them, believing them to be true, and wherein the acts and pretenses were false, states a cause of action. Shuler v. Hall, 141 P. 280, 42 Okl. 325.

Petition in an action to set aside a deed held to sufficiently state, as against a demurrer, that the grantor's mental unsoundness continued from a date named until his death. Jenkins v. Jenkins, 146 P. 414, 94 Kan. 263. A petition, filed by heirs of a grantor of unsound mind to set aside a deed, need not allege fraud other than procurement of the deed, knowing that the grantor was mentally unsound. Id.

A petition alleged that defendant, a woman, by false professions of love

and affection, and false pretenses of wealth, and by a promise to marry plaintiff, and by pretending that it was necessary to stop the opposition of her children to the marriage, induced plaintiff to convey his land to her; that she never had any intention of marrying plaintiff. Held, that the petition stated a cause of action for setting aside the conveyance, though it was the agreement of the parties that after their marriage the land should be conveyed to another person. Douthitt v. Applegate, 6 P. 575, 33 Kan. 395, 52 Am. Rep. 533.

Petition to set aside conveyances of full-blood inherited lands, executed by adult heirs on good consideration October 5, 1909, approved by a proper court, failing to allege proper grounds for avoiding conveyance, held demurrable. McCosar v. Chapman, 59 Okl. 78, 157 P. 1059.

Petition for recovery of unallotted lands of Creek Nation, purchased by defendant, alleging actual notice that plaintiff held certificate of purchase under assignment from original purchaser, held to state a cause of action. Smiley v. Scott, 59 Okl. 160, 158 P. 919.

Petition based on fraud in substitution of one policy of life insurance for another, alleging facts entitling plaintiff to rescission held sufficient, notwithstanding prayer for punitive damages, costs, etc. Myler v. Fidelity Mut. Life Ins. Co. of Philadelphia, 64 Okl. 293, 167 P. 601.

[22] In an action to reform a deed, the petition alleged that defendant in measuring the land conveyed used a false measure, so that the description in the deed did not include all the land which plaintiff intended and expected to purchase; and that if plaintiff had known of such deficiency he would not have made the purchase. Held, that the petition states a sufficient ground for the relief sought. Taylor v. Deverell, 23 P. 628, 43 Kan. 469.

A petition containing the usual allegations for judgment on a note, and alleging that, at the time of its execution and delivery, it was agreed between the parties thereto that the interest to become due on the principal indebtedness should be paid annually; that it was the intention of all the parties to the note that it should be drawn so as to read "with interest payable annually"; and that, by mutual mistake of the parties, and by mistake of the scrivener, there was inserted the clause, "with interest at the rate of 8 per cent. per annum from date until paid"—states a cause of action for the reformation of the note. Wendt v. Diemer, 58 P. 1003, 9 Kan. App. 481.

[23] It is error by the trial court to overrule a motion to make the petition, in an action for divorce, more definite and certain, that charges "that during the time the defendant lived with the plaintiff as his wife he was guilty of extreme cruelty towards the plaintiff." Callen v. Callen, 24 P. 360, 44 Kan. 370. In a petition for divorce for extreme cruelty, the particular acts complained of, and the dates of their commission, should be stated with reasonable certainty. Id. In a petition for divorce for gross neglect of duty, the particular acts complained of, and the dates of their commission, should be stated with reasonable certainty. Id. It is error by the trial court to overrule a motion to make the petition, in an action for divorce, more definite and certain, that charges "that, during the time the defendant lived with the plaintiff as his wife, he was guilty of gross neglect of duty" towards the plaintiff. Id.

A complaint for divorce which alleges "that on or about [a specified date], and on divers other occasions prior and subsequent thereto, defendant was guilty of cruel and inhuman treatment to the plaintiff, in this, to wit, slapped

said plaintiff; that for a long time past said defendant has cursed and abused said plaintiff by calling her vile names; and that defendant fails, refuses, and neglects to provide for the plaintiff and children according to his station in life"—held sufficient, in the absence of a motion to make more definite. Irwin v. Irwin, 37 P. 548, 2 Okl. 180.

A complaint for divorce which charged that the defendant had been guilty of cruel and inhuman treatment toward plaintiff, and alleged facts showing that defendant had slapped plaintiff, had violently cursed and abused her, and had failed and refused to provide for her and her children, was sufficient to give the probate court jurisdiction to hear the cause upon the statutory ground of extreme cruelty. Uhl v. Irwin, 41 P. 376, 3 Okl. 388, following Irwin v. Same, 37 P. 548, 2 Okl. 180; Id., 41 P. 369, 3 Okl. 186.

[24] Petition in action on foreign judgment held not subject to demurrer. Shufeldt v. Bank of Mound City, 61 Okl. 194, 160 P. 923.

[25] The petition in a Cherokee Indian's action to establish a trust in land based on an erroneous action of the department held sufficient to state a cause of action, where it sets forth with particularity the acts of the department, including the evidence on which it acted. White v. Starbuck, 41 Okl. 50, 133 P. 223.

Petition, alleging that plaintiffs and defendants were only heirs of a decedent who owned a school land lease, defendant for use of heirs held lease in her name and agreed to purchase with money of her own and of all the heirs for use of herself and other heirs, and by fraud and contrary to her agreement took title to herself, and for an accounting, stated a cause of action. Clark v. Frazier (Okl.) 177 P. 589.

Petition to impress trust in favor of plaintiffs on land patented to defendants held to state cause of action. Bozarth v. Mitchell, 59 Okl. 60, 157 P. 1051.

A pleading sufficient to withstand demurrer under the statute of frauds is sufficient under the statute of uses and trusts (Comp. Laws 1909, § 7267). Purcell v. Corder, 124 P. 457, 33 Okl. 68.

[26] Petition in action for specific performance of a contract for the conveyance of land, based upon letters attached thereto, held not to set up an enforceable contract of sale. Bowker v. Linton (Okl.) 172 P. 442.

Petition in an action for a specific performance of a contract for the sale of realty held not to show a completed agreement. Plante v. Fullerton, 46 Okl. 11, 148 P. 87.

A petition which alleges that plaintiff is now, and has been since the 2d day of August, 1897, the owner in fee and entitled to the possession of certain land, describing it, and that the defendants, on the 6th day of August, 1897, and on divers other days between that day and the commencement of the suit, with force and arms, and against the consent of plaintiff, broke and entered upon said premises, and, with teams of horses and mules and plows, then and there turned over and plowed, with said teams and plows, about 30 acres of said land, to the damage of plaintiff of $100, does not state a cause of action for either injury to the possession or for damages to the real estate; and a demurrer thereto, on the ground that the petition does not state a cause of action, should be sustained. Casey v. Mason, 59 P. 252, 8 Okl. 665.

In an action on a contract, a petition which is sufficiently explicit to raise an issue of fact on which plaintiff would be entitled to recover is not demurrable.[27]

[27] Thompson v. De Long, 140 P. 421, 40 Okl. 718.

Where a contract provides for the maintenance of the thing contracted for after construction, a petition in an action on the contract to recover the consideration is not demurrable for the reason that the petition states that the contract has been and is being performed; the words "is being performed" having reference to the maintenance of the thing contracted for. Piper v. Choctaw Northern Townsite & Improvement Co., 85 P. 965, 16 Okl. 436.

Where a petition alleged a contract of employment for the sale of real estate and sets forth a full performance and the accomplishment of all required by the contract, it is sufficient as against demurrer to show a cause of action for compensation. Yoder v. Randol, 83 P. 537, 16 Okl. 308, 3 L. R. A. (N. S.) 576.

A petition, alleging that a person who wrote his name across the back of a nonnegotiable note indorsed the note with intent to become liable thereon as indorser, states a cause of action. Steele v. Hudson, 30 Okl. 518, 120 P. 616.

A petition setting forth a cause of action on a note, alleging that it was executed August 4, 1902, and fell due September 20, 1902, a copy of which is attached to the petition and reads, "On September 20th we promise to pay," the year of maturity being left out, is good as against a general demurrer. A. Helm & Son v. Briley, 87 P. 595, 17 Okl. 314.

Petition held to state a cause of action against the indorser of a negotiable note executed while Wilson's Rev. & Ann. St. 1903, §§ 3607, 3622, were in force. Turner v. First Nat. Bank, 139 P. 703, 40 Okl. 498.

Petition held not demurrable for failure to allege delivery to plaintiff of a note sued on, or that plaintiff was the owner and holder, where plaintiff was the payee, and the execution, default in payment, and the amount due were duly alleged. Western & Southern Fire Ins. Co. v. Murphey, 56 Okl. 702, 156 P. 885.

A petition by a creditor, alleging that a national bank as principal creditor of an insolvent merchant had taken over the merchant's stock and agreed to pay all creditors subject to a condition which had been fulfilled, held to state a cause of action against the bank. Parker Gordon Cigar Co. v. First Nat. Bank of Claremore, 55 Okl. 468, 154 P. 1153.

Allegations that plaintiffs were the owners of a note, that it was wrongfully taken and converted by defendant, and was of the reasonable value stated, were sufficient, at least against a general demurrer. Capps v. Vasey Bros., 101 P. 1043, 23 Okl. 554.

Petition in action against a county for services of a detective agency held not to state a cause of action on express contract or quantum meruit. Smith v. Board of Com'rs of Oklahoma County, 56 Okl. 672, 156 P. 186.

A petition, in a railroad company's action on a bonus note, held sufficient as against objections that it was indefinite and uncertain and failed to state a cause of action. Coyle v. Arkansas V. & W. Ry. Co., 139 P. 294, 41 Okl. 648.

Petition, in an action for material sold to the defendant board of education, held sufficiently definite in its statement that the material was ordered

§ 576. —— Fraud—Form

The specific facts constituting fraud and illegality must be set forth.[28]

A petition attempting to plead cause of action for fraud, must show damage resulting to plaintiff from such alleged fraudulent acts,[29] and must state that plaintiff believed the fraudulent representations if such are alleged, and relied and acted on same to his

by the president. Board of Education of City of Clinton v. Houilston, 51 Okl. 329, 151 P. 1035.

[28] State v. Williams, 18 P. 727, 39 Kan. 517.

The mere averment that the board did not fully and carefully investigate and consider all the matters and things relating to the controversy is not such a charge of fraud as to impeach the award of arbitrators. Washington Nat. Bank v. Myers, 104 Kan. 526, 180 P. 268.

Where a grantor of land sues to set aside the deed on the ground that he was fraudulently induced to trade for land not worth as much as represented, but the complaint does not allege the value of the property which he conveyed, nor state the difference between the value of that conveyed and that which he received, and also alleges that he was to have one-half of the property exchanged for a block in which he had a half interest, and that defendants had fraudulently induced him to accept less than one-half of what he received, but does not state that the defendants agreed to give him one-half of what was received, the complaint is defective, in that there is a confusion of theories, and that there are insufficient facts alleged to sustain any theory. Grentner v. Fehrenschield, 68 P. 619, 64 Kan. 764. Where a grantor seeks to set aside the deed because of fraud of defendants, based on misrepresentations, he must allege and prove what the misrepresentations were, that they were false, that he believed them to be true, and that he relied and acted upon them. Id.

Petition in action for fraud held not to state cause of action, so that demurrer thereto was properly sustained. Martin v. Ford Motor Co. (Okl.) 167 P. 992.

Petition in action for damages from fraud in connection with an exchange of properties, held to state a cause of action. Lamb v. Dodson, 139 P. 125, 41 Okl. 639.

In an action for injuries, allegations in the petition of fraud in the procurement of a release from plaintiff held sufficient. St. Louis & S. F. R. Co. v. Reed, 132 P. 355, 37 Okl. 350.

Petition, in action for conspiracy to defraud plaintiff of his stock in a bank and oust him from his position as president, held to state a cause of action. Felt v. Westlake (Okl.) 174 P. 1041.

In an action by a lessor to cancel a gas and oil lease, the petition alleged the execution of the lease, giving a copy thereof. No facts outside of the lease indicating fraud or mistake, or that the interests of the lessor would be injuriously affected by the provisions of the lease, were stated in the petition. Held, that a demurrer was properly sustained. Ringle v. Quigg, 87 P. 724, 74 Kan. 581.

[29] Martin v. Ford Motor Co. (Okl.) 167 P. 992.

damage.[30] But in an action to cancel a deed alleged to have been procured by false and fraudulent promises a specific averment that the grantee did not intend at the time he made said promise or contract to carry it out is not necessary if from the facts alleged the existence of his fraudulent intent not to carry out his contract can be clearly inferred.[31]

CLAUSE OF PETITION ALLEGING FRAUD

Plaintiff further alleges that the signing of said contract was obtained from plaintiff by fraud, circumvention and misrepresentation, as follows: That the said plaintiff had agreed with defendant to employ defendant to act as foreman for plaintiff on certain properties of plaintiff in ——— county, Oklahoma, at a stipulated salary of $——— per month, and that a written contract covering said employment should be drawn and executed by said parties, and afterwards, to wit, on or about the ——— day of ———, 19—, the said defendant came to the city of ———, Oklahoma, to the said plaintiff, for the purpose of having said contract signed, and exhibited to said plaintiff a paper writing, and informed plaintiff that it contained the contract agreed upon as above alleged, and that the plaintiff, believing that it was the same contract, signed the same; and that afterwards plaintiff discovered that, in the signing of said contract by him and defendant, the defendant had willfully and fraudulently substituted an entirely different contract from the one agreed upon by the parties; and that by reason of such willful and fraudulent substitution said plaintiff at the time, without any knowledge of the wrongful act on the part of the defendant, and believing that the contract as presented was the one which had been agreed upon, signed the contract as presented which contained the provision that (set forth provision fraudulently inserted); that the said plaintiff did not intend to make or deliver said contract, but without negligence on his part, and solely by reason of the deception, artifice, and fraud of the defendant in falsely representing that said paper contained the contract agreed upon between them, as above alleged, and then and there substituting therefor said contract containing said provision (as

[30] McCracken v. Cline, 55 Okl. 37, 154 P. 1174.
[31] Blackburn v. Morrison, 118 P. 402, 29 Okl. 510, Ann. Cas. 1913A, 523.

above stated), and by reason of the trust and confidence placed by said plaintiff in said defendant the said plaintiff signed said contract.

§ 577. —— Limitations—Form

Where the petition shows that the cause of action is barred by the statute of limitations, the burden is on plaintiff to plead facts relieving such action from the bar of the statute in order to successfully defeat a general demurrer to the petition.[32]

In an action for relief on the ground of fraud, where a discovery of the fraud must be alleged to avoid the bar of limitations, the circumstances under which the fraud was discovered need not be

[32] Delzell v. Couch (Okl.) 173 P. 361.

Sufficient.—Where plaintiff alleged that he commenced an action on certain town warrants within due time and had failed in such action otherwise than on the merits, and it appeared that the new action was commenced within one year after failure of the former action, defendant's demurrer raising the question of laches and limitations was improperly sustained. De Roberts v. Town of Cross, 101 P. 1114, 23 Okl. 888.

Where more than five years have elapsed from maturity of the note as shown by the pleading and the time of bringing action, but facts are alleged suspending the running of the statute, so that the bar had not expired at the commencement of the action, a demurrer on the ground that petition shows that action is barred by limitations should be overruled. Christie v. Scott, 94 P. 214, 77 Kan. 257.

A petition on an implied contract, disclosing a liability of more than three years' standing, which alleges that defendant has continuously resided out of the state since a time prior to the accrual of the cause of action, shows that limitations may not have run, so as to prevent that defense being raised by demurrer. Reed v. Humphrey, 76 P. 390, 69 Kan. 155.

An allegation that plaintiff did not discover the falsity of the representations until a certain date held to negative constructive, as well as actual, notice within the statute of limitations (Code Civ. Proc. Kan. § 17, subd. 3 [Gen. St. Kan. 1909, § 5610]). Gillies v. Linscott, 146 P. 327, 94 Kan. 217.

In an action against a husband and wife to foreclose a mortgage executed by both on the wife's property, a payment made by the husband was relied on to take the note out of the statute of limitations. The wife pleaded that she was surety, only, on the note, and that the payments were not made by her or for her, or with her knowltdge or consent. The plaintiff replied that the money obtained on such note and mortgage went to pay off a valid lien on the wife's property. Held error for the court to exclude evidence tending to support such reply. Hawkins v. King, 64 P. 32, 62 Kan. 526.

Plaintiff's allegation to avoid limitations by showing that the relation between him and defendant is one of trust and confidence, and that the existence of the debt was fraudulently concealed, held sufficient as against a general demurrer. Valley Abstract Co. v. Page, 141 P. 416, 42 Okl. 365.

Insufficient.—A statement in a petition that when a debt accrued defendant

stated; nor need plaintiff negative the fact that it might have been discovered earlier.[33]

However, where plaintiff alleges that the fraud was consummated more than two years prior to the commencement of the action, but fails to state when the fraud was discovered, the petition is vulnerable to demurrer.[34] But where a petition in an action to recover for fraud on its face does not show that the cause of action is barred by limitations, a demurrer on that ground should be overruled.[35]

In action on note which on its face shows that it is barred by

resided in another state, which he afterwards left, held insufficient to interrupt the running of limitations, where more than five years have elapsed since such change of residence. Perry v. Robertson, 150 P. 223, 93 Kan. 703.

Allegations that at the time of the accrual of plaintiff's cause of action she was a "morphine fiend" afflicted with "morphinomania," and was wholly under defendant's influence, and did not realize her condition or the wrong done her, held a sufficient pleading of that "legal disability" or "unsound mind" which will suspend the running of limitations under Code Civ. Proc. Kan. § 18 (Gen. St. Kan. 1909, § 5611). Gillmore v. Gillmore, 139 P. 386, 91 Kan. 707, 51 L. R. A. (N. S.) 834, modifying judgment on rehearing 137 P. 958, 91 Kan. 293, 295, 51 L. R. A. (N. S.) 838.

[33] Ottawa Condensing Co. v. Dawkins, 120 P. 356, 86 Kan. 312.

The petition in an action on fraud, brought more than two years after its perpetration, need not set out manner of discovery to avoid bar of limitations. Pickens v. Campbell, 159 P. 21, 98 Kan. 518.

[34] Doyle v. Doyle, 7 P. 615, 33 Kan. 721.

In action for fraud in exchange of property, where pleading on its face showed that alleged fraud was more than two years before commencement of action, pleader, to escape the two years' limitation, must allege discovery of fraud less than two years before action. Cornelssen v. Harman, 103 Kan. 624, 176 P. 141.

Since, under Rev. Laws 1910, § 4657, judgment obtained by fraud is voidable only if suit of judgment debtor be brought within two years after discovery of fraud, where suit is instituted more than two years after rendition of judgment, petition failing to show discovery of fraud within two years prior to suit is subject to general demurrer. Stauffer v. Watts (Okl.) 174 P. 1031.

A petition based on fraud, which shows that the fraudulent transaction complained of occurred more than two years before the commencement of suit, but fails to allege that the fraud was discovered within that period, so as to take the case out of the statute, is insufficient. McCalla v. Daugherty, 46 P. 30, 4 Kan. App. 410, writ of error dismissed Tipton v. McCalla, 54 P. 1054, 59 Kan. 719.

In an action brought May 20, 1911, for fraudulent conversion on April 7, 1908, held that an allegation that plaintiff did not discover the fraud until October 1, 1910, brought the case within the statute of limitations (Rev. Laws 1910, § 4657). Maddox v. Smith, 46 Okl. 678, 148 P. 842.

[35] Shawnee Life Ins. Co. v. Taylor, 58 Okl. 313, 160 P. 622.

limitations as pleaded, plaintiff must plead facts relieving the action from the bar of the statute.[36] Thus, in action on Ohio note, which on its face is barred by pleaded statute of limitations, it is not enough for plaintiff to plead and prove that action was not barred in Ohio, where defendant had resided, but he must plead and prove that defendant has not been in Oklahoma long enough to bar action under its statute.[37]

In an action against a resident on a contract executed outside the territory, when defendant was a nonresident, plaintiff is not required to plead or prove facts showing that the obligation is not barred by the laws of the state where defendant formerly resided, as such question is a matter of defense.[38]

A party who pleads a shorter period of limitation than the one applicable to the case waives the benefit of the longer and correct one, which might have been pleaded.[39]

Where none but the five-year statute of limitations of the state is pleaded on foreclosure, the court cannot give the pleader the benefit of the six-year statute of another state.[40]

A petition on a policy of insurance which shows that the action was not commenced within the time limited by the policy is insufficient.[41]

PETITION—CLAUSE IN AVOIDANCE OF LIMITATIONS

That on the date upon which the cause of action accrued upon the aforesaid note, the said defendant was out of and absent from the state of Oklahoma and, ever since said date and up to within thirty (30) months next preceding the filing of this petition herein, the said defendant has remained and been out of and absent from the state of Oklahoma, and that the said defendant has not lived in or been in the state of Oklahoma for a period of or for periods aggregating five (5) years prior to the filing of this peti-

36 Shaw v. Dickinson (Okl.) 164 P. 1150.

37 Id. In an action brought after expiration of the limitation period on a note on which is indorsed a receipt of a payment, the petition must allege payment by the debtor to remove the bar of the statute. Liphart v. Myers, 156 P. 693, 97 Kan. 686.

38 Keagy v. Wellington Nat. Bank, 69 P. 811, 12 Okl. 33.

39 Downey v. Atchison, T. & S. F. R. Co., 57 P. 101, 60 Kan. 499.

40 Grigsby v. Williams, 89 Kan. 758, 132 P. 1001.

41 Oakland Home Ins. Co. v. Allen, 40 P. 928, 1 Kan. App. 108.

tion herein, and that the cause of action herein stated and alleged is not barred by the statute of limitations.

§ 578. Matters necessary to be pleaded

Matters which must be proven to entitle plaintiff to recover must be alleged in the petition. This rule has been applied to local customs,[42] recovery of money on notes[43] and otherwise,[44] recovery for necessities,[45] money paid,[46] insurance,[47] loss of business,[48] re-

[42] A local custom or usage applying to a special or particular class of business may not be proven to explain ambiguous terms of a contract, unless pleaded. Gilbert v. Citizens' Nat. Bank of Chickasha, 61 Okl. 112, 160 P. 635, L. R. A. 1917A, 740.

Evidence of a custom of fire insurance agents to renew policies of insurance without notifying the insured was inadmissible where not pleaded. School Dist. No. 22, Love County, v. Culwell, 62 Okl. 283, 162 P. 949.

A local custom or a custom applying to a special class of business may not be the basis of recovery, unless such custom is pleaded, and the exclusion of evidence of such custom in the absence of pleading the same is not error. Smith v. Stewart, 116 P. 182, 29 Okl. 26.

[43] In an action by an indorsee against the indorser, the petition must allege notice of dishonor by the maker or facts excusing notice. Grimes v. Tait, 99 P. 810, 21 Okl. 361.

A petition, setting out the payee's special warranty on the transfer of the note, but not alleging its breach, does not state a cause of action against the

---

[44] A petition by a trustee in bankruptcy to recover money alleged to be a preferential transfer must show that, if the transfer stands, the creditor will receive a greater percentage of his debt than other creditors of the same class. West v. Bank of Lahoma, 85 P. 469, 16 Okl. 328.

[45] The petition in a wife's action to recover from her husband sums expended by her for her own support must show that the expenditures were involuntarily made for articles necessary to her support when she was entitled to pledge her husband's credit therefor. Sodowsky v. Sodowsky, 51 Okl. 689, 152 P. 390.

Where a petition, based on a foreign contract, against a minor for legal services, sought to recover on an express contract, or on a quantum meruit, and did not plead the lex loci contractus, showing that the services were "necessary," held, that it did not state a cause of action. Marx v. Hefner, 46 Okl. 453, 149 P. 207, Ann. Cas. 1917B, 656.

[46] A common count for money paid out and expended at the instance or request of a third person and for his use, in order to withstand a demurrer, must aver such facts as will show either an express agreement or an implied obligation to pay the sum claimed, and should aver not only that the money was paid at the request of the defendant, but that it was paid for his use and benefit. Fox v. Easter, 62 P. 283, 10 Okl. 527.

[47] See note 47 on following page.

[48] Where loss of business is averred, names of the parties withdrawing their patronage should be given. Kee v. Armstrong, Byrd & Co. (Okl.) 151 P. 572.

payee. Clark v. Sallaska (Okl.) 174 P. 505, 4 A. L. R. 746. In suit to enforce a liability against the payee, an allegation that on his transfer he represented that there were no equities between himself and the maker states no cause of action against the payee, without further alleging setting out existing equities. Id.

An undertaking indorsed on a note, "For value received, I hereby guaranty the payment of the within note," waiving demand and protest, is a direct promise to pay the note, and not a guaranty; and, in an action on such undertaking, the complaint need not allege the insolvency of the maker of the note, or an effort by plaintiff to collect the note from the maker. Walter A. Wood Mowing & Reaping Co. v. Farnham, 33 P. 867, 1 Okl. 375.

47 The petition, in an action on a life insurance policy, held demurrable where plaintiff declared on the "binder" alone, without setting forth the policy subsequently issued pursuant to it and declaring thereon. Ætna Life Ins. Co. v. Bradford, 45 Okl. 70, 145 P. 316, Ann. Cas. 1918C, 373.

Where standard fire insurance policy prescribed by Rev. Laws 1910, § 3482, covered loss of personal property, while contained in described building, petition not stating that property was in such building at time of fire, did not state cause of action. American Cent. Ins. Co. v. Boyle (Okl.) 171 P. 714.

Where a standard fire policy insures against loss while merchandise is contained in a building described and not elsewhere, a petition which failed to state that at the time of the fire the merchandise was contained in such building held not to state a cause of action. Miller v. Connecticut Fire Ins. Co., 47 Okl. 42, 151 P. 605.

Petition, in an action on a fire insurance policy, held demurrable, where it failed to allege that the insured building and personalty were located at the time of the fire as required by the policy. Germania Fire Ins. Co. v. Barringer, 142 P. 1026, 43 Okl. 279.

Conditions in fire policy prescribing time and method of giving notice of loss, etc., must be complied with, and petition exhibiting policy containing such conditions and not averring compliance is subject to demurrer. Shawnee Fire Ins. Co. v. Beaty, 64 Okl. 61, 166 P. 84.

Waiver of proof of loss should be pleaded by person relying thereon. Hartford Fire Ins. Co. v. Mathis, 57 Okl. 332, 157 P. 134.

Under the express provisions of Comp. Laws 1909, § 3784, the plaintiff in an action on an insurance policy is relieved from alleging the performance of promissory warranties or conditions subsequent and need allege performance only of conditions precedent. Great Western Life Ins. Co. v. Sparks, 38 Okl. 395, 132 P. 1092, 49 L. R. A. (N. S.) 724.

To support an action on a policy insured must allege and prove compliance with conditions precedent, or a waiver thereof. St. Paul Fire & Marine Ins. Co. v. Mittendorf, 104 P. 354, 24 Okl. 651, 28 L. R. A. (N. S.) 651.

Where a petition in an action on a hail policy set out the policy requiring a written notice at the home office of the company within 48 hours after loss, and that suit shall not be maintained unless notice of such loss is given and the amount ascertained as provided by the policy, it is demurrable where it contains no allegation of the giving of the notice required or of any facts excusing the failure to obtain one. Gray v. Reliable Ins. Co., 110 P. 728, 26 Okl. 592.

In an action on a policy of insurance, by the terms of which concurrent insurance is allowed, and where it is provided, in substance, that, in case there is concurrent insurance, the loss shall be prorated between the companies

covery of taxes paid,[49] conversion,[50] use and occupation,[51] actions on bonds,[52] action for prize,[53] compromise agreement,[54] broker's

issuing the different policies, and that the defendant company shall also be entitled to the benefits of limiting clauses in the policy issued by the other company, where the plaintiff in fact takes a policy from another company, it is not necessary that he should allege, in his petition, that he holds the other policy, nor set up its provisions. It is for the defendant, by its answer, to avail itself of any defense it may have by reason of such coinsurance. Ætna Ins. Co. v. McLead, 45 P. 73, 57 Kan. 95, 57 Am. St. Rep. 320.

In an action on a policy providing that, in case of disagreement as to amount of loss, appraisers shall be selected to ascertain the same, etc., it is not necessary that the declaration negative the occurrence of disagreement requiring an arbitration. Long Island Ins. Co. of Brooklyn v. Hall, 46 P. 47, 4 Kan. App. 641.

[49] Petition, in action under Laws 1913, c. 240, art. 1, § 7, to recover illegal taxes paid, held to state a cause of action. Lusk v. Ryan (Okl.) 171 P. 323. In action under Laws 1913, c. 240, art. 1, § 7, to recover money paid on account of an illegal tax, it is not necessary that the petition aver that such payment was made under duress. Id.

Petition, in an action to recover illegal taxes paid under protest, held demurrable for failure to sufficiently state a cause of action based on willful and illegal act of county board of equalization, where it did not charge malfeasance, neglect, or misconduct of officers having authority in the premises. Lusk v. Porter, 53 Okl. 294, 156 P. 224.

[50] The petition in an action for conversion of personalty must show that plaintiff has been deprived of possession of such personalty. McCracken v. Cline, 55 Okl. 37, 154 P. 1174.

[51] An occupant of lands is, without special contract and though the relation of landlord and tenant does not exist, liable for the rents to any person entitled to same; and hence, in an action therefor, it is not essential to

---

[52] In ward's action on guardian's bond, where guardian's devastavit is sufficiently averred, it is not necessary to allege in the petition that the devastavit has not been paid, that being a matter of defense to be pleaded by the surety. Southern Surety Co. v. Jefferson (Okl.) 174 P. 563.

In an action on a penal bond, it must be alleged and proved that plaintiff sustained damages. Kelley v. Seay, 41 P. 615, 3 Okl. 527.

To authorize recovery in action against the sureties on the official bond of a public officer, plaintiff must allege in his petition and show defaults covered by and included in the condition of the bond sued on. Board of Education of City of Alva v. Fulkerson (Okl.) 179 P. 599.

[53] In an action for a prize pursuant to an award made by a jury selected under stated conditions, the petition must either allege that the prize was thus awarded, or state facts showing that the award was prevented by defendant's fault. Southwestern Land Co. v. McCallam, 136 P. 1093, 41 Okl. 657.

[54] To state a cause of action based on a compromise agreement, the petition must allege a liability of defendant, an agreement of the amount to be paid, and an acceptance of this agreement in settlement of original claim or dispute. Gunn v. Fryberger (Okl.) 176 P. 248.

action for commission,[55] or consideration;[56] the basis of recovery in actions for wrongful death,[57] attachment,[58] bond to release at-

allege the existence of such relation or contract. Bilby v. Gilliland, 137 P. 690, 41 Okl. 150.

In an action by the owner of real estate, under Comp. Laws 1909, § 4094, for use and occupation, it is not necessary to allege the relationship of landlord and tenant or an agreement to pay rent. Earl v. Tyler, 128 P. 269, 36 Okl. 179. In an action for use and occupation, it is error to quash an attachment or give judgment on the pleadings for failure to charge that the relation of landlord and tenant existed, or an agreement to pay rent. Id.

[55] A petition to recover broker's commissions, which shows that plaintiff acted for both parties, is demurrable unless it also alleges that the dual relationship was known and assented to by both. Skirvin v. Gardner, 129 P. 729, 36 Okl. 613.

[56] Where a party declares on a contract which does not import a consideration, the consideration must be alleged. Gunn v. Fryberger (Okl.) 176 P. 248. Petition alleging defendant's promise to pay plaintiff's expenses consequent on personal injury while in defendant's employ, but not alleging a consideration therefor did not state a cause of action. Id.

[57] In an action brought under Code Civ. Proc. § 422, providing that an action may be maintained for the death of one caused by the wrongful act of another, the damages recovered to inure to the exclusive benefit of the widow and children, if any, or next of kin, it is only necessary to allege that deceased left surviving him as his next of kin the plaintiff, who was his mother. Missouri Pac. Ry. Co. v. Barber, 24 P. 969, 44 Kan. 612.

Under Code Civ. Proc. § 422, it is not required that the petition in an action by parents against a railroad company for the killing of their child by a train should state how plaintiffs were injured pecuniarily, nor is it necessary to allege special damages. Erb v. Morasch, 54 P. 323, 8 Kan. App. 61.

In action for damages for the death of plaintiff's wife, caused by the wrongful act of another, a demurrer to the petition is properly sustained, where it fails to show there are no children, under Wilson's Rev. & Ann. St. 1903, §§ 4611, 4612, providing that such damages must inure to the benefit of the widow and children, if any, or next of kin. Bartlett v. Chicago, R. I. & P. Ry. Co., 96 P. 468, 21 Okl. 415.

Under Rev. Laws 1910, §§ 5281, 5282, permitting action for damages for wrongful death by widow or next of kin where there is no representative it is necessary to plead and prove that no representative is or has been appointed. Sanders v. Chicago, R. I. & P. Ry. Co. (Okl.) 169 P. 891.

Since Gen. St. §§ 2b, 3c, 4d, vest the right of action for death by wrongful

[58] Where an attachment is levied on real estate as the property of a nonresident defendant, though title stands in the name of another, the attaching creditor acquires a lien on any interest the debtor may have in such land which he may enforce after judgment, in a suit in the nature of a creditor's bill, and in such case the petition need not aver execution issued and returned nulla bona; it being sufficient to aver in appropriate language the lack of any other available assets. Ziska v. Ziska, 95 P. 254, 20 Okl. 634, 23 L. R. A. (N. S.) 1.

tachment,[59] judgment,[60] usury,[61] accord and satisfaction,[62] dam-

act in the minor children of deceased, if an action be not brought by the relict within six months after the death of deceased, a complaint, by a widow in Kansas, for the death of her husband in Missouri, which alleges that he left minor children, but fails to show that she sued within six months, is defective. Hamilton v. Hannibal & St. J. R. Co., 18 P. 57, 39 Kan. 56.

In an action for the death of an infant child, the petition must clearly show that the action is brought within two years from the date of death, as required by Gen. St. 1897, c. 95, §§ 418, 419. City of Eureka v. Merrifield, 58 P. 243, 9 Kan. App. 579.

[59] In an action on a bond given to release property attached, a prayer to reform the bond so as to bind the principal and the sureties "to pay any judgment that might be rendered in the case" instead of "against it," meaning the defendant, will not be granted where, if the property attached actually belonged to the principal, the bond was in proper form, and if it was in fact the property of other parties, plaintiff should have so stated in its original petition. Drovers' Live Stock Commission Co. v. Custer County State Bank, 91 P. 850, 19 Okl. 302.

[60] The petition in an action on a judgment against a decedent's estate, held not demurrable, though it failed to show that the claim on which the judgment was based, was duly filed with the administrator. Chitty v. Gillett, 46 Okl. 724, 148 P. 1048, L. R. A. 1916A, 1181. Petition in an action on a judgment held not demurrable for failure to state that the judgment was final and not appealed from, where it alleged facts showing the judgment to be valid and subsisting. Id.

[61] Under Rev. Laws 1910, § 1005, a written demand for a return of usury must be alleged and proven to authorize a recovery of same. Mitchell v. Clark, 52 Okl. 628, 152 P. 354.

Petition to recover usurious interest under Rev. Laws 1910, § 1005, failing to allege that interest has been paid, is demurrable. Oklahoma State Bank of Altus v. Curzen, 57 Okl. 100, 156 P. 1191.

A written demand for the return of usury is a condition precedent to a suit therefor under Rev. Laws 1910, § 1005, and must be alleged and proven. Texmo Cotton Exch. Bank v. Liston, 61 Okl. 33, 160 P. 82.

A petition to recover usurious interest held sufficient where it alleged that such interest had been paid, and that the taking and receiving of same was knowingly done. First Nat. Bank v. Ingle, 132 P. 895, 37 Okl. 276.

A petition to recover alleged usurious interest by the party contracting for its payment should allege that it had been paid, and that the receiving of the interest was knowingly done; and, where these averments are lacking, it is error to overrule a general demurrer. First Nat. Bank v. Landis, 113 P. 718, 27 Okl. 710.

A petition to recover alleged usurious interest should allege that it had been paid and that the receiving of the same was knowingly done. First Nat. Bank v. Ellis, 114 P. 620, 27 Okl. 699, Ann. Cas. 1912C, 687.

[62] To state a cause of action based on accord and satisfaction, the petition must allege a liability of defendant, an agreement of amount to be paid, and an acceptance of this agreement in settlement of original claim or dispute. Gunn v. Fryberger (Okl.) 176 P. 248.

ages in general,[63] injuries to passenger[64] and to shipment,[65] breach of contract,[66] malicious prosecution,[67] action under federal Em-

[63] Where, in an action against a carrier for delay in forwarding plaintiff's baggage, the petition alleges that by negligence of the company plaintiff was delayed in carrying on his business, whereby he was damaged in a certain sum, plaintiff cannot recover for the rental value of the use of butcher's tools contained in his baggage, without setting forth such claim by amendment to his petition. Choctaw, O. & G. R. Co. v. Zwirtz, 73 P. 941, 13 Okl. 411. Where, in an action against a carrier for delay in forwarding plaintiff's baggage, the petition alleges that by negligence of the company plaintiff was delayed in carrying on his business, whereby he was damaged in a certain sum, plaintiff cannot recover for the rental value of the use of butcher's tools contained in his baggage, without setting forth such claim by amendment to his petition. Id.

Where a petition contained several separately stated causes of action each for damages "in the sum of $———," and a concluding paragraph charged damages in a stated sum, the petition was not demurrable for failure to state the damages in each paragraph. Patterson v. Morgan, 53 Okl. 95, 155 P. 694.

In an action to recover damages for personal injuries, the petition must show that the injuries were the natural and probable consequences of the negligent act of defendant, and that it should have foreseen such an injury; and a petition which fails to show such facts does not state a cause of action. Mayne v. Chicago, R. I. & P. Ry. Co., 69 P. 933, 12 Okl. 10.

[64] Where, in an action for personal injuries sustained by a passenger, the carrier desires to avail itself of its rules and regulations relating to passengers and a violation thereof by the passenger, the same must be pleaded. Lane v. Choctaw, O. & G. R. Co., 91 P. 883, 19 Okl. 324.

[65] In an action on a contract for loss and injury to live stock during transportation a petition which fails to allege compliance with the conditions of the contract requiring notice of the claim for damages within a certain time, or a waiver thereof is insufficient to state a cause of action. Midland Valley R. Co. v. Ezell, 116 P. 163, 29 Okl. 40.

[66] Essential averments of petition to recover for breach of contract of employment are allegation of contract, breach, performance, or readiness to perform on part of plaintiff, and damages. Sharpless Separator Co. v. Gray, 62 Okl. 73, 161 P. 1074. Where petition for damages for breach of employment contract contains necessary allegations to state cause of action for breach, fact that damages were denominated salary instead of damages does not render it fatally defective. Id.

In an action for breach of a written contract to convey land wherein plaintiff agreed to buy subject to an option given R. and W. expiring at a certain date, it must be alleged that defendant failed to sell and convey after R. and W. failed to exercise their option. Hart v. King, 123 P. 1062, 31 Okl. 761.

[67] A petition, to state a cause of action for malicious prosecution, must charge that the prosecution was commenced against plaintiff, that it was instituted or instigated by defendant, that it was malicious, that it has been legally terminated in plaintiff's favor, and that it was without probable cause. Chicago, R. I. & P. Ry. Co. v. Holliday, 30 Okl. 680, 120 P. 927, 39 L. R. A. (N. S.) 205.

While special damages should be averred in the petition in order to notify

ployers' Liability Act (U. S. Comp. St. §§ 8657–8665),[68] death,[69] trespass,[70] equity,[71] offer to do equity,[72] divorce,[73] injunction,[74]

the defendant of the nature of the plaintiff's claims, and to prevent surprise at the trial, it is not necessary, in an action for malicious prosecution, where the demand sounds wholly in damages, and there is but a single cause of action, to state specifically and in separate amounts the different items which go to make up the total sum of damages, as it is enough to claim so much in gross for the wrong done. Ten Cate v. Fansler, 65 P. 375, 10 Okl. 7. A complaint for damages for malicious prosecution, averring that by such prosecution and arrest by defendant plaintiff was deprived of his liberty, oppressed, degraded, and brought into disrepute among his neighbors; that his good name and business standing had been injured; and that he had been kept from pursuing his business and had sustained damages in a certain sum,—is sufficiently particular as to the special allegations to justify a recovery of damages. Id. A complaint for damages for malicious prosecution, averring that by such prosecution and arrest plaintiff was deprived of his liberty, brought into disrepute among his neighbors, his good name and business standing impaired, and he had been kept from pursuing his business, adequately states the acts constituting the fraud, malice, etc., on which a claim for punitive damages can be sustained. Id.

[68] Where the facts bring the case within the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), the provisions of that act need not be expressly referred to in the pleadings. St. Louis & S. F. R. Co. v. Snowden, 48 Okl. 115, 149 P. 1083.

[69] Petition in a widow's action against a sheriff and his bondsmen for death of her husband, who was killed by a deputy sheriff, held not demurrable as failing to show that the deputy was acting under color of office. Meek v. Tilghman, 55 Okl. 208, 154 P. 1190.

[70] One may maintain trespass for injury to his possession, only when he is in the actual possession and so alleges, or where he is the owner of the fee, and further shows by his petition that the land is unoccupied, and the plaintiff has the constructive possession thereof. Casey v. Mason, 59 P. 252, 8 Okl. 665.

[71] Where plaintiff files a bill to set aside a decision of the Land Office on the ground that it was procured by fraud, but fails to plead such a state of facts as will enable a court of equity to grant relief, a demurrer will be sustained, though the bill may show a wrong has been done for which plaintiff has no adequate remedy at law, where it fails to show that equity can, if the allegations are established, correct the fraud. Estes v. Timmons, 73 P. 303, 12 Okl. 537, judgment affirmed 26 S. Ct. 85, 199 U. S. 391, 50 L. Ed. 241.

[72] In action by full-blood Choctaw to recover possession of his surplus allotment attempted to be conveyed by him under agreement made void by Act

[73] In an ordinary action for divorce and alimony on the ground of abandonment, in order to entitle the court, as a court of equity, to make an allowance for the wife's support, there must be specific allegations of the facts relied on as grounds for such relief, independent of the statute. Birdzell v. Birdzell, 11 P. 907, 35 Kan. 638, denying rehearing 6 P. 561, 33 Kan. 433, 52 Am. Rep. 539.

[74] See note 74 on following page.

enjoining collection of taxes,[75] trusts,[76] specific performance,[77] re-

Cong. April 26, 1906, § 19, the petition need not allege a tender or offer to return the consideration. Folsom v. Jones (Okl.) 173 P. 649.

Petition to recover price of realty conveyed to plaintiff because of failure of title, which fails to allege offer to reconvey, is demurrable. Carson v. Walker, 57 Okl. 182, 156 P. 1172.

Where purchaser, suing for specific performance, pleads tender of consideration and his ability and willingness to perform, the petition is not defective on account of a defective plea of proffer of consideration in court. Skidmore v. Leavitt (Okl.) 175 P. 503.

[74] A petition setting out no portion of a proposed life insurance policy except a "war rider," alleging that the Insurance Commissioner with whom a form of such policy had been filed will, if not enjoined, wrongfully disapprove such policy because of a provision as to the rights of insured if he dies while engaged in the military service, "or within six months thereafter," is insufficient to show, as against a general demurrer, that such commissioner will act arbitrarily or fraudulently in so doing. Mutual Benefit Life Ins. Co. of Newark, N. J., v. Welch (Okl.) 175 P. 45. A petition to enjoin the Insurance Commissioner from disapproving a form of life insurance with a "war rider" attached, to withstand a demurrer should affirmatively show that a threatened disapproval by such commissioner will be arbitrary and fraudulent, by a full disclosure of all the facts affecting the question. Id.

A petition which has for its purpose the obtaining of an injunction to restrain persons from interfering with stock running at large in the free range portions of the territory, which fails to aver that all the public school, college, public building and indemnity lands are leased by the school land board in the congressional township where it is sought to have such injunction operate, is fatally defective, and it is not error to sustain a demurrer to such petition, as stock is only permitted to run at large in the free range portion of the territory in those congressional townships and at such periods as all and the whole of the public school, college, public building, and indemnity lands of such township are held under lease as provided by law. Addington v. Canfield, 66 P. 355, 11 Okl. 204.

[75] A petition to enjoin the collection of taxes pursuant to a raise by the board of equalization, where the only ground for equitable relief is that the property is assessed beyond its fair cash value, and which fact is not alleged, is subject to demurrer. Caldwell v. Board of Com'rs of Noble County, 125 P. 467, 34 Okl. 265.

Where petition for injunction shows that complaining party has failed to bring himself within Rev. Laws 1910, § 7354, by showing that his property has been assessed more than once in the same year, or has been assessed for taxes to which it was not subject, the petition is bad on demurrer. Higgins, Neville & Boddy v. Wood, 143 P. 662, 43 Okl. 554.

[76] A petition to declare a resulting trust in lands in the Cherokee Nation does not state facts sufficient to constitute a cause of action, where it does not show that an allotment certificate has been issued to the land. Thompson v. Hill, 48 Okl. 304, 150 P. 203.

[77] In an action by a vendor to enforce the specific performance of a contract for the sale of lands, where fraud, misconduct, or mistake is relied on

scission and cancellation,[78] reformation of instruments,[79] alteration of instruments,[80] foreclosure,[81] contest of allotment,[82] capaci-

as the ground for setting aside an appraisal of the lands duly made by appraisers selected in accordance with the agreement of the parties, it must be pleaded. Guild v. Atchison, T. & S. F. R. Co., 45 P. 82, 57 Kan. 70, 57 Am. St. Rep. 312, 33 L. R. A. 77.

[78] In an action to cancel a deed, it is unnecessary to allege the want of an adequate remedy at law, but the facts should be pleaded from which that conclusion can be drawn. Mosier v. Walter, 87 P. 877, 17 Okl. 305. In an action to cancel a deed, where the acts of defendant pleaded are such as to create a reasonable belief that he had abandoned the contract involved, the vendor may rescind and bring an action to cancel the deed without pleading notice of disaffirmance in his petition. Id.

A petition for the rescission of a contract for the exchange of real estate need not allege a tender of the property received in the exchange, it being sufficient to offer to return the same, under St. 1890, § 894. Day v. Mooney, 41 P. 142, 3 Okl. 608.

In an action for rescission of a contract and for damages, it is not necessary to aver a return or offer to return a machine which the defendant had agreed to furnish and install, but which had not been accepted by plaintiffs, and was not in their possession when the action was commenced. King Bros. v. Perfection Block Mach. Co., 106 P. 1071, 81 Kan. 809.

The petition in an action to rescind a contract for fraud must charge that a material misrepresentation known by defendant to be false was made by him with intent to induce plaintiff to contract, and that plaintiff relied upon and was deceived and damaged by such misrepresentations. Sipes v. Dickinson, 136 P. 761, 39 Okl. 740. A petition in an action to cancel a conveyance for fraud in its procurement held sufficient. Id.

Pleading and proof that the lands conveyed were a homestead within Williams' Const. art. 12, §§ 1, 2, and the statute, held essential to a successful attack on a wife's deed in which her husband did not join. Norton v. Kelley, 57 Okl. 222, 156 P. 1164.

[79] In an action for reformation and specific performance of a written contract, and for compensation for improvements made under a subsequent parol agreement, plaintiff, in order to recover on the parol agreement, must allege the terms thereof in such language as to enable the court to form some conclusions as to what the agreement was. Mehlin v. Superior Oil & Gas Co., 136 P. 581, 39 Okl. 565.

[80] Ratification by maker of instrument materially altered, to be available, must be pleaded. Wayne County Nat. Bank v. Kneeland, 61 Okl. 265, 161 P. 193.

[81] Petition in action to foreclose mechanic's lien, that does not contain an allegation that the material furnished was actually used in the construction of the building, is defective. Ryndak v. Seawell, 76 P. 170, 13 Okl. 737.

Where it did not appear that a mortgage contained a provision accelerating an unmatured indebtedness or authorizing plaintiff to foreclose on default in payment of any one of the notes or interest, held, that no cause of action was stated. Griffin v. Jones, 45 Okl. 305, 147 P. 1024.

The petition in foreclosure need not specify with particularity the charac-

[82] See note 82 on following page.

ty in which plaintiff sues,[83] act of bankruptcy,[84] and condemnation proceedings.[85]

Foreign laws relied on in an action on contract must be pleaded,[86] but it is not necessary to plead the statutes in force in the Indian Territory.[87]

ter of title held by an adverse party in the mortgaged premises. Davis v. Moffett, 144 P. 607, 43 Okl. 771.

The plaintiff in foreclosure need not set forth with particularity the character of an adverse party's title in the mortgaged premises. Ashcraft v. Moffett, 44 Okl. 386, 144 P. 1041.

Where a petition to enforce a landlord's lien against a tenant's crops under Rev. Laws 1910, §§ 3809, 3810, fails to allege any contract with the tenant, or to show anything due, or that the tenant was obligated to pay the portion of the crop claimed, it does not state facts sufficient to constitute such a lien. Lee v. Lowery, 140 P. 1175, 42 Okl. 148.

[82] Petition attacking decision of Secretary of Interior in deciding contest of an allotment, and in awarding a patent, not showing that he made "a gross mistake of facts," or a material error of law, or that fraud was practiced on him by successful party, failed to state a cause of action. Hill v. Burnett (Okl.) 169 P. 1120. Petition attacking decision of Secretary of Interior in contest of allotment, and in awarding a patent, held not to state facts sufficient to constitute a cause of action against defendant to whom patent issued. Id.

Where sales contract gave buyer right to return certain goods at cost within 30 days after cancellation, petition to recover for such parts should allege their return, and, failing to do so, was subject to demurrer. Ford Motorcar Co. v. Rackley (Okl.) 166 P. 427.

[83] On an averment in a petition that plaintiff is the duly qualified and acting assignee of a bank in the state of Missouri not denied by the answer, it will be presumed that the necessary steps have been taken under the laws of Kansas to authorize him to sue in that state as assignee. Rogers v. Coates, 16 P. 463, 38 Kan. 232.

[84] Under Bankr. Act July 1, 1898, §§ 60a, 60b, as amended by Act Feb. 5, 1903, § 13 (U. S. Comp. St. § 9644), petition failing to charge that creditor had reasonable cause to believe that preference was intended held insufficient to state a cause of action. Rodolf v. First Nat. Bank, 121 P. 629, 30 Okl. 631, 41 L. R. A. (N. S.) 204.

[85] Petition to condemn a right of way for a road held sufficient, though it did not allege that the petition filed with the board pursuant to Rev. Laws 1910, § 7553, was signed by a majority of the voters of the township. Board of Com'rs of Harper County v. Day, 46 Okl. 83, 147 P. 1045.

[86] Marx v. Hefner, 46 Okl. 453, 149 P. 207, Ann. Cas. 1917B, 656.

[87] The laws of Arkansas, which were extended over the Indian Territory, being in force in Oklahoma under Const. Schedule, § 1, as to rights under Indian Territory contracts, need not be pleaded. Marx v. Hefner, 46 Okl. 453, 149 P. 207, Ann. Cas. 1917B, 656.

Under Const. Schedule, § 1, held unnecessary to plead and prove the statute of Arkansas relating to contract executed before statehood; the court tak-

A complaint for negligence must show injury to plaintiff from violation of duty by defendant.[88]

It is not necessary for a plaintiff corporation to allege in its petition that it is a corporation.[89] Hence, where a company doing business under a corporate name contracts for the sale of nursery stock, and assigns the contract to a third person, who sues to recover the amount due thereon, the petition is not fatally defective, as against an objection to evidence, because it fails to describe the assignor by stating whether it was a corporation, a partnership, an unincorporated association, or an individual transacting business under a corporate name.[90]

A foreign corporation need not allege in its petition compliance with the laws as to doing business in the state.[91]

It is not necessary to a sufficiency of a cause of action on a contract to set out the fact that the instrument was stamped.[92]

The petition in a suit to cancel a deed for fraud need not allege an offer to do equity.[93]

The plaintiff in an action to recover real estate need not deraign his title with particularity.[94]

ing judicial notice of the same. Barnes v. American Soda Fountain Co., 121 P. 250, 32 Okl. 81.

In an action brought since statehood on an infant's contract made in the Indian Territory prior to statehood, it was unnecessary for plaintiff to plead and prove the statutes of Arkansas, since Const. Schedule, § 1, requires that judicial notice be taken of same. Carroll v. Durant Nat. Bank, 38 Okl. 267, 133 P. 179.

88 Lisle v. Anderson, 61 Okl. 68, 159 P. 278, L. R. A. 1917A, 128.

89 Jantzen v. Emanuel German Baptist Church, 112 P. 1127, 27 Okl. 473, Ann. Cas. 1912C, 659.

90 Strong v. Moore, 89 P. 895, 75 Kan. 437.

91 White Sewing Mach. Co. v. Peterson, 100 P. 513, 23 Okl. 361.

A complaint by a foreign corporation is not demurrable because it fails to allege compliance with Laws 1890, c. 18, art. 20, prescribing conditions on which foreign corporations may do business in the state. Keokuk Falls Imp. Co. v. Kingsland & Douglas Manuf'g Co., 47 P. 484, 5 Okl. 32.

92 Baumhoff v. Oklahoma City Electric & Gas & Power Co., 77 P. 40, 14 Okl. 127.

93 Washington v. Colvin, 55 Okl. 774, 155 P. 251; Harris-Lipsitz Co. v. Oldham, 56 Okl. 124, 155 P. 865.

94 Shellenbarger v. Fewel, 124 P. 617, 34 Okl. 79.

§ 579. Forms—Petitions

SUIT TO CANCEL CONVEYANCES

(Caption.)

Come now the plaintiffs and complain of the defendants and each of them, and for cause of action state and allege:

That the plaintiffs, A. M. and B. M., are husband and wife, and were at all the times hereinafter mentioned, and now reside in ——— county, Oklahoma.

That the said plaintiff A. M. is a member of the Creek Nation of Indians, and as such member of said Nation of Indians there was allotted to him the following described land: Lots 3 and 4 in section 7 and the east half of the southwest quarter of section 7, otherwise described as the southwest quarter of section 7, township 18, and range 7 east, in Creek county, Oklahoma.

That the said defendants, J. D., F. S., R. H., and F. E. are residents of ——— county, Oklahoma.

That said allotment became very valuable, which fact was known to the defendant J. D., but which was not known to the plaintiffs.

That the said plaintiff A. M. was at all times hereinafter mentioned and had been for many years prior thereto a confirmed drunkard.

That the said above-named allotment had become very valuable, but through the long use of intoxicating liquors the mind of the said plaintiff A. M. had become so weakened that he did not realize that said allotment had become valuable, and did not appreciate the value of money or the value of property; that the said plaintiff A. M. had gotten to that stage where he would do anything, or sign any paper or anything, for any one in whom he had confidence or to get money or whisky; that he did not have sufficient mind to know or appreciate the value of said land.

That said above described land was at all the times hereinafter mentioned of the actual value of not less than $500,000.

That the said defendant J. D. had throughly investigated said above described land and knew its value, and knew what it was worth, and, knowing the weakness of said A. M., had gained his confidence; that after learning the value of said land the said defendant J. D. did, on or about July 2, 1914, through drink and in-

toxicating liquors, secure a six months' option to buy an undivided one-half interest in said above described land at a price of $30,000, a copy of which said option contract is hereto attached as Exhibit A and made a part hereof, the same as if copied herein in full; that after the said J. D. had procured said option to buy a well of large capacity was brought in on or near said above land.

That for the purpose of securing the land for nothing the said J. D. entered into an agreement with said defendant F. S., the family physician of plaintiffs, to procure from plaintiffs an undivided one-fourth interest in said above described land without any consideration whatever, and in order to carry out said design did procure the signature of plaintiffs to a deed and a contract on an undivided one-fourth of the above described land, and which said instruments were signed by plaintiff A. M. while in an intoxicated condition and at a time when his mind and intellect was so weakened by the use of intoxicating liquor that he did not know what he was doing or what he was about. A copy of said deed and said contract, dated November 7, 1914, are hereto attached as Exhibits B and C and made a part hereof the same as if copied herein in full. That the said A. M. was induced to sign said papers by the said defendant F. S., in whom he had confidence at the time, and under whose influence and treatment he then was and had been for a long time, and who pursuant to the conspiracy aforesaid and as a part of the same transaction, secured for himself, F. S., at the same time without consideration a deed and contract to an undivided one-fourth interest in said above described land, worth at least $125,000. A copy of said deed and said contract of November 10, 1914, are hereto attached as Exhibits D and E and made a part hereof, the same as if copied herein in full. That during all the time the negotiations were carried on the plaintiff A. M. had no understanding, all of which was known to the said J. D and his agent, F. S., and the plaintiff B. M., during all of said time was in fear of her life at the hands of plaintiff A. M. and thus signed all of said above named instruments.

That plaintiff A. M., after making of said instrument aforesaid, was inadvertently sent to a hospital for inebriates by F. S., the agent of J. D., and remained in said hospital and other hospitals for a long time, and was never fully recovered from his enfeebled condition of his mind as a result of the use of intoxicating liquors, and

has recently discovered the facts in this case, and the fraudulent conduct of J. D. and his said agents, F. S. and P. S., in the procuring of the various contracts from plaintiffs aforesaid. That the said J. D. procured said contracts and said deed from plaintiffs without any consideration whatsoever, other than the $100 paid plaintiff at the time of securing the option of July 2, 1914, all of which has been repaid the said J. D. That said defendants have possession of and exercise control over the said property described in the petition.

That the said J. D. has drawn all the royalty from said land described in said contract of November 7, 1914, and said contract of July 2, 1914, and of which royalty he has retained $7,500; that the said J. D. is now drawing the royalty from said property, all of which in equity and good conscience belongs to this plaintiff. That in order to preserve the fund and prevent it from being dissipated it will be necessary to appoint a receiver for this property, to take charge of same, and manage, conduct, and hold same until the trial of this said cause. That large quantities of oil are now being run and paid to said J. D., and unless a receiver be appointed said royalties will in the future, as in the past, be paid to the said J. D., and thus lost to this plaintiff.

That said instruments aforesaid have been placed of record in the office of the register of deeds, county clerk's office of Creek county, Oklahoma, and by reason of the inequitable conduct of the said J. D. and his said agents, F. S. and P. S., and because of the entire want of consideration, and because of the mental condition of said A. M. at the time said instruments were signed, the said deeds and contracts held by the defendants J. D., R. H., and F. E. should be set aside and held for naught, and an accounting should be had between the parties, plaintiffs and defendants, of the proceeds received from said land.

That the said defendants R. H. and F. E. were particeps criminis with J. D. in putting over said fraudulent transaction, and fraudulently assisted the defendant J. D. in securing said deed and said contracts aforesaid. That the said defendants R. H. and F. E., and each of them, knew all the facts and circumstances above set forth, and knew or had reason to know, or with due diligence could have known, that said plaintiff A. M. signed said deeds and

said contracts at a time when he was in an intoxicated condition, and at a time when his mind was so weakened by the use of intoxicating liquor that he, A. M., did not know what he was doing or what he was about, or the value of money or the value of his property. That the said defendants R. H. and F. E., and each of them, knew or had reasons to know, or with due diligence could have known, that the said defendant J. D. paid, and that the plaintiffs, A. M. and B. M., received, no consideration for said conveyance, or for said deeds or said contracts, or for said property; and plaintiffs further state, as a part of said conspiracy between the said defendants, and in pursuance of said conspiracy, and at the same time or soon thereafter, and on or about the 15th day of December, 1914, the defendant J. D. executed a conveyance to the defendants R. H. and F. E. on a part of said land, and that the said J. D. has without consideration and fraudulently conveyed to said defendants R. H. and F. E. one-sixteenth interest in the above described land. That neither the said defendant R. H. nor the said defendant F. E. paid any consideration for said conveyance or said one-sixteenth. A copy of said instrument is hereto attached as Exhibit F, and made a part hereof, the same as if copied herein in full.

That defendant F. S. claims some right, title, interest, or estate under or by virtue of the said J. D.'s deed, a copy of which is hereto attached, but same is null and void; that defendant F. S. should be required to set forth what right, title, interest, or estate, if any, he claims under or by virtue of the said J. D.'s deed aforesaid, and that same should be decreed null and void.

Wherefore plaintiffs pray that the said contract, dated July 2, 1914, and attached as Exhibit A, and the deed and contract executed by plaintiffs to said defendant J. D., and which said contract bears date of November 7, 1914, and that the deed dated December 15, 1914, by J. D. to R. H. and F. E. be canceled, set aside, and held for naught, and that the said defendants and each of them be required to state and set forth what interest, if any, they have or claim to said land, and that the same be ordered delivered up, canceled, and held for naught. Plaintiffs further pray for an accounting between the parties, and for the appointment of a receiver, and for such other and further relief as this court may in equity and good conscience deem plaintiffs entitled to, and that plaintiffs

be given possession of and control over the said property described in the petition.

A. M.,
B. M.,
Plaintiffs.

———, Attorneys for Plaintiffs.

(Attach as exhibits, copies of deeds, conveyances, etc., sought to be canceled.)

PETITION TO ESTABLISH RESULTING TRUST

(Caption.)

Comes now the plaintiff, A. B., and for his cause of action against the defendant, C. D., alleges and states:

1. That on or about the ——— day of ———, 19—, plaintiff was desirous of purchasing, and had been and was negotiating for the purchase of, certain real estate in ——— county, Oklahoma, described as follows: Lot 1, etc.; that said tract of land was then owned by one G. H.

2. That on or about said date, the defendant, being well aware of the fact that plaintiff was desirous of purchasing said land and that he was negotiating for the purchase of the same, came to this plaintiff and represented to him that he, the defendant, was also desirous of purchasing said tract.

3. That defendant further falsely and fraudulently represented to this plaintiff that he, the defendant in addition to the above described tract of land, also desired to purchase another tract of land which adjoined the same, and described as follows: Lot 2, etc.; and that defendant further falsely and fraudulently represented to this plaintiff that said tract of land was also then owned by the said G. H.; that defendant further falsely and fraudulently represented to plaintiff that of the two above described tracts he was particularly desirous of purchasing the last named, being said lot 2, etc.

4. That defendant further falsely and fraudulently represented to this plaintiff that, if plaintiff would refrain from making any further attempts to purchase the said lot 1, etc., the defendant would carry on negotiations with the said G. H., and that he would purchase said lot 2, etc., for himself, and that he would purchase the said lot 1, etc., for this plaintiff.

5. That plaintiff was well aware of the fact that said lot 1, etc., had been owned by the said G. H. at a date shortly prior to said ——— day of ———, 19—, but that, as a matter of fact, defendant had already purchased the same from the said G. H. prior to said ——— day of ———, 19—, without the knowledge of this plaintiff.

6. That plaintiff, relying on such false and fraudulent representations of defendant, was induced to and did, on or about the ——— day of ———, 19—, make and enter into an agreement with defendant, whereby it was understood and agreed by and between plaintiff and defendant that defendant should and would carry on negotiations with the said G. H. for the purchase of the two above described tracts of land; that by the terms of such agreement it was understood and agreed that defendant would purchase said lot 2, etc., for himself, and that he would purchase the said lot 1, etc., for this plaintiff, and that the purchase price of each of said tracts was to be one-half of the total amount paid for the entire lots 1 and 2, etc.; that it was further understood and agreed by and between plaintiff and defendant that defendant would advance the purchase price of the said lot 1, etc., for this plaintiff, and that as security for the repayment thereof defendant should take the legal title of said tract in his own name, and hold the same until this plaintiff should repay him for such sum so advanced for the plaintiff, and that upon such repayment defendant should convey the legal title to said tract to this plaintiff; and that plaintiff thereby bound and obligated himself to repay to defendant the said sum so advanced and to be advanced by defendant for plaintiff.

7. That at the time of entering into said agreement with this plaintiff, defendant made such false and fraudulent representations aforesaid to this plaintiff, for the purpose of inducing plaintiff to withdraw negotiations for the purchase of said lot 1, etc., and that defendant did not intend at the time of making such agreement to carry out the same, but that he intended to purchase said tract of land for himself.

8. That, at the time of entering into said agreement with defendant, plaintiff believed and relied on such false and fraudulent representations of defendant, and that plaintiff did not know that defendant had already at that time purchased the said lot 2, etc., and

that plaintiff did not learn of the same until long afterwards, when making preparations to bring this suit.

9. That plaintiff, relying on such agreement and promises of defendant so made that he would purchase said tract of land for the plaintiff and advance the purchase price thereof for plaintiff, refrained from carrying on any further negotiations for the purchase of said land himself, and did not make any further attempts to purchase the same himself, as he otherwise would have done, except for such promises of defendant.

10. That, in pursuance to said contract and agreement, defendant thereafter, and on the ——— day of ———, 19—, did so purchase and obtain the legal title to said southwest quarter of the said lot 1, etc., from the said G. H. and that defendant did so advance the purchase price therefor, and did so take the legal title thereof in his own name; but that plaintiff does not know and has been unable to ascertain the amount so advanced and paid by defendant for the purchase price of said land.

11. That, on numerous occasions after entering into said agreement with defendant, plaintiff inquired of the defendant whether he had purchased said premises or not, but that at all times prior to the ——— day of ———, 19—, defendant falsely and fraudulently informed this plaintiff that he had not yet been able to obtain the same.

12. That on or about the ——— day of ———, 19—, defendant informed this plaintiff that he had purchased said premises, and that immediately thereafter plaintiff sold his home, so as to obtain money with which to carry out his part of the agreement, and with which to repay defendant for the amount of the purchase price of said tract of land advanced by defendant, and that plaintiff has been at all times since entering into said agreement, and still is, ready, able, and willing so to do.

13. That immediately thereafter, and on numerous occasions up to the present time, plaintiff has requested defendant to inform him as to the amount so advanced and paid for plaintiff for said tract of land, and has requested defendant to accept repayment of such amount and to convey the legal title to said lot 1, etc., to this plaintiff, in accordance with their said contract and agreement, but that, in violation thereof, defendant has refused, and still refuses, so to do.

14. That thereafter, on the ——— day of ———, 19—, said defendant sold and conveyed an undivided one-half interest in said lot 2, etc., and in the said lot 1, etc., to one E. F., in violation of said contract and agreement between plaintiff and defendant; that said E. F. is now the owner and holder thereof; that this plaintiff does not know and has been unable to ascertain the amount of the consideration which defendant received from said E. F. for such one-half interest in said tract of land; that plaintiff did not learn of such sale until long afterwards.

15. That the reasonable value of said lot 1, etc., at the time same was purchased by defendant, was the sum of ——— dollars ($———); that the reasonable value of the same at this time is the sum of ——— dollars ($———), and that the reasonable value of a one-half interest in the same at this time is the sum of ——— dollars ($———); that the value of the use of said land from the ——— day of ———, 19—, up to the present time is reasonably worth the sum of ——— dollars ($———).

Wherefore the plaintiff prays that the court shall ascertain the amount which defendant paid for the purchase price of said lot 1, etc., so that plaintiff may tender into court one-half of such sum for the undivided one-half interest to which defendant still holds the legal title, and so that the court may ascertain and determine the amount which the plaintiff should pay defendant, and that upon such tender and payment that the court by its decree adjudge the plaintiff to be the owner of an undivided one-half interest in said premises, free and clear of all liens and incumbrances, and that the defendant be required to convey said premises to plaintiff by a good and sufficient deed, and that, upon his failure to do so by the time to be fixed by the court, the decree herein shall stand in lieu of said conveyance, and that the plaintiff have judgment against the defendant for the sum of ——— dollars ($———), the difference between the market value of such one-half interest which defendant is unable to convey to plaintiff, at the time said premises were purchased by defendant, and the present market value thereof, or that he have judgment against the defendant for the difference between one-half of the purchase price of the same paid by the defendant, to be determined by the court, and the present market value of an undivided one-half interest in said premises, and that the plaintiff have judgment against defendant for the further sum

of ——— dollars ($———), the value of the use of said premises from ———, 19—, to date; and the plaintiff prays for such other relief as may be just and equitable, and for costs of this suit.

X. Y., Attorneys for Plaintiff.

(Verification.)

PETITION TO FORECLOSE MECHANIC'S LIEN

(Caption.)

Said plaintiff, for his cause of action against the said defendants C. D. and E. F., and against the said defendants G. H. Company and J. K. Company, alleges and states:

1. That on or about the ——— day of ———, 19—, the said plaintiff entered into a contract with the said defendants C. D. and E. F., by and through their duly authorized architect and agent, M. N., by which said plaintiff was to furnish certain material and supplies and to do and furnish certain work and labor for the construction of a certain building for the said defendants, upon the following described property, to wit: (Describe same) of which said defendants were then and there the owners.

2. That said plaintiff further alleges that he furnished said material and supplies, and performed and furnished said work and labor, in accordance with the terms and conditions of said contract, and that there remains due and payable from said defendants to this plaintiff the sum of ——— dollars ($———). Said plaintiff alleges that material was last furnished under said contract on the ——— day of ———, 19—, and that labor was last furnished and performed under said contract on the ——— day of ———, 19—.

3. Said plaintiff further alleges that, in order to obtain a lien upon said premises, on the ——— day of ———, 19—, within less than four months after said material and labor was last furnished, he filed a verified statement in the office of the court clerk of ——— county, state of Oklahoma, containing the amount due him from said defendants for said material and labor furnished and performed, which said statement further showed the name of the owner of said property, the names of the claimant, and a description of the property upon which said work was done and material furnished subject to said lien, and that due notice thereof was served on the owners C. D. and E. F. A copy of said statement,

together with the itemized exhibit therein contained, is hereto attached, marked Exhibit A, and made a part of this petition.

4. And the said plaintiff alleges that he has performed all the conditions and requirements contained in said contract in accordance with the terms thereof; that the itemized account shown in said Exhibit A is correct, and that there is due to this plaintiff from the said defendant the sum of ——— dollars ($———), with interest thereon at the rate of ——— per cent. per annum from the ——— day of ———, 19—.

5. The said plaintiff further alleges that the said defendants G. H. Company and J. K. Company claim some lien on said premises, but that their claims or liens, if any, are inferior and junior to the interest and lien of this plaintiff, and that there are no other claims or other parties claiming any lien upon said premises, or any incumbrances thereon, other than hereinbefore stated.

Wherefore, the said plaintiff demands judgment against said defendants, C. D. and E. F., for the sum of ——— dollars ($———), with interest thereon at the rate of ——— per cent. per annum from the ——— day of ———, 19—, and for a reasonable attorney's fee for his attorneys herein, and that upon the hearing of this cause the judgment herein be declared a first and prior lien upon said premises, and that said lien be foreclosed, and that the said premises be ordered sold, according to law, and the proceeds of said sale be applied, first, to the payment of the judgment in favor of this plaintiff, together with the interest thereon and the costs of this action and said attorney's fee; the residue, if any, to be applied as the court may direct; and for such other and further relief as the plaintiff may in equity be entitled to.

X. Y., Attorneys for Plaintiff.

(Attach copy of verified lien statement.)

PETITION IN ACTION ON VERIFIED ACCOUNT—PLAINTIFF SUING AS ADMINISTRATOR

(Caption.)

Comes now the plaintiff, A. B., as administrator of the estate of C. D., deceased, and for cause of action against the defendant, E. F., alleges:

That defendant is indebted to the plaintiff in the sum of ——— dollars. on an account for goods sold and delivered by the said

C. D. to the defendant at his request, between the ——— day of ———, 19—, and the ——— day of ———, 19—, at ———, for which he promised to pay said sum of ——— dollars.

An itemized and verified statement of said account is hereto attached, marked Exhibit A, and made a part of this petition, and said account is true and correct.

That no part of said sum of ——— dollars has been paid, except the sum of ——— dollars, and that the balance thereof of ——— dollars is due and payable to plaintiff from defendant.

That thereafter on or about the ——— day of ———, 19—, said C. D. died intestate in the city of ———, county of ———, state of Oklahoma, and a resident of said county; that on or about the ——— day of ———, 19—, letters of administration upon the estate of said C. D., deceased, were duly issued and granted to plaintiff by the county court of ——— county, appointing him administrator of the estate of said deceased, and that plaintiff thereupon duly qualified and entered upon his duties as such administrator, and is now such administrator.

Wherefore plaintiff prays judgment against the said defendant for the sum of ——— dollars, with interest thereon at the rate of 6 per cent. per annum from the ——— day of ———, 19—, and for his costs.

(Signatures,)
Attorneys for Plaintiff.

(Attach itemized statement of account as Exhibit A.)

State of Oklahoma, }
County of ———. } ss.:

———, being duly sworn, says: That he is the plaintiff above named, and that the above and foregoing account is true and correct in every particular, and that there is due and unpaid thereon from said E. F. to said C. D., deceased, the sum of ——— dollars, with interest thereon at the rate of ——— per cent. per annum, from the ——— day of ———, 19—, as set forth in said account.

(Signature.)

Subscribed and sworn to before me, this ——— day of ———, 19—.

(Signature,)
Notary Public.

(Seal.)

My commission expires ———.

PETITION IN DAMAGE SUIT—PERSONAL INJURY

(Caption.)

Comes now the said plaintiff, A. B., and for her cause of action against the defendants, C. D. and E. D., and each of them, alleges and states:

1. That plaintiff is the mother of F. B., a minor of the age of ——— years, and that the defendants herein at all times mentioned were husband and wife, and were the owners of a certain automobile, and in the use and operation of said automobile as hereinafter alleged they were acting as the agents of each other and within the general scope of their employment as such.

2. That heretofore, to wit, on or about the ——— day of ———, 19—, at or about the hour of ———, ——— M., of said day, plaintiff's said son, F. B., was riding a bicycle southward in the alley between ——— and ——— streets in the city of ———, ——— county, Oklahoma, and that as plaintiff's said son emerged from the said alley into ——— street in a southerly direction, the said defendant E. D. was operating defendants' said automobile westward on ——— street, and that at said time the said defendant E. D. was operating said automobile at a high, dangerous, and excessive rate of speed, to wit, more than ——— miles per hour.

3. That as said automobile of said defendants approached the point hereinbefore referred to where plaintiff's son rode his said bicycle into ——— street, the said defendants, and each of them, failed and neglected to give any notice or warning whatever of the approach of said car, and failed and neglected to keep a proper lookout for persons who might be in the street immediately in front of them at said time, and failed and neglected to have their said automobile under proper control, and that the said defendants, and each of them, moved and propelled, or caused their said automobile to be moved and propelled, over the person of plaintiff's son, and inflicted upon him painful, permanent, and serious injuries as hereinafter alleged.

4. That the acts of the said defendants, and each of them, in driving and causing to be driven the said automobile as aforesaid, were in direct, open, and notorious violation and contravention of certain sections of the ordinances of the city of ———, for the year ———, which ordinances were in full force and effect on the

said ——— day of ———, 19—, being sections ——— and ———, and being in words and figures as follows, to wit: (Set forth sections of ordinances violated).

5. That the injuries hereinafter referred to, which were sustained by plaintiff's son, were not caused by any fault or neglect of his or any fault or neglect of this plaintiff's, but were caused wholly, directly, and proximately by and on account of the negligence of the defendants, and each of them, as hereinbefore set out.

6. Plaintiff further states that when her son was struck by said automobile as aforesaid, the skin covering his body was broken in a number of places, the flesh severely bruised, and he immediately became sick, sore, lame, and disabled; that the bones in plaintiff's son's right leg at the knee joint, and both below and above the knee joint, were crushed, fractured, and broken, and the nerves, tendons, ligaments, and muscles surrounding said knee cap, both above and below were severely strained, torn, and injured, and that on account thereof plaintiff's said son has become permanently injured, and his right leg has become shortened and stiffened, and he has been permanently scarred, crippled, and disfigured for life, and that said limb has greatly impaired plaintiff's son's earning capacity and his power of locomotion.

7. Plaintiff further states that, on account of said injuries to her said son, she was forced to procure for him a physician and medical aid, and has become liable and bound to pay for such services, including the hospital bill, the sum of $———, which amount is a reasonable charge therefor, and plaintiff further states that at the time her said son was injured, as aforesaid, he was a strong, robust, healthy, able-bodied boy, ——— years of age, and was employed by ———, and was earning from his employment the sum of $——— per week, all of which plaintiff's son contributed to her support, health, and comfort.

8. Plaintiff further states that since her said son was injured, as aforesaid, he has been wholly incapacitated to do or perform any work or labor, has contributed nothing whatever to her support, and she verily believes that it will be a long time before plaintiff's son, F. B., will again be able to work and earn money and contribute to the plaintiff herein, and that she has been deprived of his earnings and services until he becomes twenty-one years of age on account of said injuries, and on account of the loss of the services of

her said son, as aforesaid, and the amount she has become liable and bound to pay for medical expenses and services, she has sustained damages in the sum of ——— dollars, no part of which has ever been paid.

Wherefore plaintiff prays that she have and recover of and from the defendants, and each of them, the sum of ——— dollars, and for her costs of this action. ———, Attorneys for Plaintiff.

PETITION IN ACTION FOR WRONGFUL DEATH

(Caption.)

Comes now the plaintiff, A. B., administrator of the estate of C. D., deceased, and for his cause of action against the defendant, E. F. & Co., a corporation existing under and by virtue of the laws of the state of ———, states:

That on the ——— day of ———, 19—, defendant owned, maintained, and operated in the city of ———, Oklahoma, a system of electric lights, and that by means of wires the electric current was carried over, upon, and along the street of said city of ———, from the power house to the various points of service in said city; that during the night of the ——— day of ———, 19—, or early on the morning of the ——— day of ———, 19—, said company's wires became disabled and out of repair, and, being either broken, or disengaged from their fastenings, fell to the ground, upon the sidewalk and crossing in the said city of ———, at the intersection of ——— street and ——— avenue in said city, and said defendant negligently permitted said wire to remain so grounded and lying upon said street crossing from about ——— o'clock ——— M. until after daylight in the morning, when said street was thronged with passers-by; that the defendant, C. D., while passing along said street about or a little after daylight, had his attention called to said obstruction lying upon said crossing, and being ignorant of the character of said wire, and presuming, and having a right to presume, that defendant would not permit a live wire to remain under the feet of passers-by upon so crowded a thoroughfare, took hold of same, to cast it aside, out of the way of pedestrians, and was killed by the powerful current with which said wire was at the time charged.

And plaintiff alleges that said C. D., deceased, came to his death by the gross negligence and wanton misconduct of defendant, its agents and employees, and that deceased came to his death without

fault on his part, and to the damage of his estate in the sum of ——— dollars.

Wherefore plaintiff prays judgment in the sum of ——— dollars, and his costs herein expended.

———, Attorneys for Plaintiff.

MONEY DUE FOR SERVICES PERFORMED

Petition

(Caption.)

Comes now the plaintiff, A. B., and for his cause of action against the said defendants alleges and states:

1. That said defendants, C. F. and D. F., are, and were at all times hereinafter mentioned, copartners, doing business under the firm name of F. Brothers, which firm is and was composed of C. F. and D. F.

2. That on or about the ——— day of ———, 19—, under such firm name and style, defendants made and entered into an oral contract with this plaintiff, duly accepted by both plaintiff and defendants, whereby plaintiff was employed as general manager and buyer of defendants' shoe stores in the city of ———, ——— county, Oklahoma; that for and in consideration of plaintiff's services, as such general manager and buyer, he was, under and by the terms of said contract, to receive from defendants the sum of ——— dollars ($———) per week as salary, and in addition thereto a bonus or commission of five per cent. (5%) of the increase in business of defendants said shoe stores during the period that plaintiff should continue in the employ of defendants; that under the terms of said contract, it was agreed that settlement of said bonus or commission was to be made every six months, or the part thereof that plaintiff continued in the employ of said defendants; that under the terms of said contract, and in accordance with the uniform custom of determining increase in business, the increase in business of defendants' said shoe stores was to be determined by comparing the business of each calendar month with the business done in the same calendar month of the preceding year.

3. That in accordance with said contract plaintiff, on or about the ——— day of ———, 19—, entered upon the duties as the general

manager and buyer of defendants' shoe stores in the city of ———, Oklahoma, and so continued up to on or about the ——— day of ———, 19—, that the increase in business of defendants' said shoe stores in the city of ———, Oklahoma, during said period while plaintiff so continued in the employ of defendants as such general manager and buyer, amounted to a total of ——— dollars ($———); that an itemized schedule showing the said increase by calendar months for said period is hereto attached, marked Exhibit A and made a part hereof; that under the terms of said contract plaintiff became and is entitled to a five per cent. (5%) bonus or commission of such increase for said period, or the sum of ——— dollars ($———).

4. That defendants have taken and received the full benefits of said contract and of plaintiff's work thereunder, but have failed and refused to pay the plaintiff for his work and services in carrying out said contract, though often requested so to do, except the sum of $——— per week, and have failed and refused to pay the plaintiff his said five per cent. (5%) bonus or commission on the increase in business of defendants' said shoe stores during the time which plaintiff continued in the employ of defendants, though often requested to pay the same, and that there is now due plaintiff for said work and services under said contract the sum of ——— dollars ($———).

Wherefore plaintiff prays judgment against the said defendants for the sum of ——— dollars ($———), together with interest thereon at the rate of six per cent. (6%) per annum from the ——— day of ———, 19—, and for his costs herein expended.

X. Y., Attorney for Plaintiff.

(Verification.)

(Attach exhibit.)

Division III.—Joinder, Splitting, Consolidation, and Severance

§ 580. Joinder—Forms of motions

"The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of any one of the following classes:

"First. The same transaction, or transactions, connected with the same subject of action.

"Second. Contracts, express or implied.

"Third. Injuries, with or without force, to person and property, or either.

"Fourth. Injuries to character.

"Fifth. Claims to recover the possession of personal property, with or without damages for the withholding thereof.

"Sixth. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same.

"Seventh. Claims against a trustee, by virtue of a contract, or by operation of law.

"But the causes of action so united must all belong to one of the classes, and must affect all the parties to the action, except in action to enforce mortgages or other liens.[95]

[95] Rev. Laws 1910, § 4738.

An action in the name of vendees purchasing by separate deeds the undivided interest of certain heirs, and also in the name of such heirs, to declare a purchaser of the same land from another a trustee, held not a misjoinder of causes of action. Smith v. Kennedy, 46 Okl. 493, 149 P. 197.

Action by a client against his attorney, his attorney's wife, and a third person to have a trust declared and recover damages, where attorney fraudulently procured conveyance of client's property to his wife and by the wife to the third person, was not an improper joinder of causes of action. Maloy v. Johnson, 121 P. 257, 32 Okl. 92.

Causes of action under the mining act and under the common law may be joined. Cheek v. Missouri, K. & T. Ry. Co., 131 P. 617, 89 Kan. 247.

Under Code Civ. Proc. § 83, providing that causes of action arising out of the same transaction may be joined, and that causes of action so united "must affect all the parties to the action," an action against an assessment insurance association and the holder of an insurance certificate to enforce an attorney's lien for services to the holder of the certificate cannot be joined with an action on a bond given under Sess. Laws 1885, c. 131, requiring the officers of each such association to give bond for the proper payment and disbursement of all moneys which come into their hands and for the faithful performance of all contracts made with certificate holders. Hentig v. Southwestern Mut. Benevolent Ass'n, 25 P. 878, 45 Kan. 462.

In an action under the mutual demurrage act (Laws 1905, c. 345), it is proper to unite all claims for damages directly flowing from one transaction, whether they be such as are determined in amount by the statute and are generally designated as penalties or as are not so designated. Star Grain & Lumber Co. v. Atchison, T. & S. F. Ry. Co., 116 P. 906, 85 Kan. 281.

Where a treasurer of the board of education gives an ordinary official bond, and afterwards, upon the order of the board, gives an additional bond with substantially the same condition as the first, but with different sure-

In this section the term "cause of action" means a redressible wrong; its elements being the wrong and the relief provided.

The "subject of action" is a primary right and its infringement. The term "transaction" is used in the first clause as expressing all the acts, or groups of related acts, which go to make up one entire project, system, or deal, and in the latter clause it includes only such acts, or groups of acts, as in themselves constitute separate,

ties, and he fails to deliver to his successor in office the balance of the school fund due to the school corporation, and the board commences an action therefor on both bonds, two causes of action are not improperly joined. Gilbert v. Board of Education, 25 P. 226, 45 Kan. 31, 23 Am. St. Rep. 700.

A petition declaring on a purchaser's promise to pay in cash, instead of in stock, if within a certain time a cement plant had not been established, has been held not demurrable for misjoinder, though it alleged bad faith and sought a receivership. Delgarno v. Middle West Portland Cement Co., 145 P 823, 93 Kan. 654.

In an action by one holding a tax title to land, an answer setting up a general denial, facts showing plaintiff's title in the land to be invalid, and a third count alleging that after judgment was first rendered in the case, and subsequently set aside, but before the vacation, plaintiff sold the land, and appropriated the proceeds to his own use, with a prayer for recovery of the value of the land, did not show a misjoinder of causes. Flint v. Dulany, 15 P. 208, 37 Kan. 332.

There was no misjoinder of causes of action in a petition by co-owners of property destroyed by fire set by sparks from defendant's locomotive, to recover the value of the property, wherein were joined, as plaintiffs, insurance companies which had paid losses on the property, and which sought to be subrogated to the rights of the owners under such judgment as might be rendered in favor of the latter. Atchison, T. & S. F. R. Co. v. Huitt, 41 P. 1051, 1 Kan. App. 788.

A married woman deposited notes, secured by a mortgage on her land, as collateral security for her husband's debt to a bank. Interest was afterwards paid on the notes. The mortgage was foreclosed, and the land bid in by the mortgagee, who took possession, and received the rents and profits. The husband afterwards paid the debt in full. No part of the interest paid, or of the proceeds of the land, had been applied to the debt. The wife sues the bank to obtain an accounting, a reconveyance of her land, and a cancellation of the personal judgment rendered against her in the foreclosure suit. Held to state only one cause of action. Washington Nat. Bank v. Woodrum, 55 P. 330, 60 Kan. 34.

Guardian.—Where a guardian gave two additional bonds, conditioned the same as his guardianship bond, the sureties on the several bonds could be joined in one suit, for the amount due from the guardian to his successor. People's Bank & Trust Co. v. Nelson, 132 P. 493, 37 Okl. 500.

In an action against a former guardian of certain minors for an accounting, allegations of fraud, waste, mismanagement, and wrongful appropriation of the minors' property did not render the petition objectionable for misjoinder of causes of action. Charles v. Witt, 129 P. 140, 88 Kan. 484.

redressible wrongs; and they are connected with the subject of action whenever they affect, grow out of, or constitute separate infringements of, the same right.[96]

All the rights of the parties, both legal and equitable, so far as they are consistent with one another and affect the rights of the same parties, may be united in one action.[97]

Causes of action in tort may be joined in separate counts with causes of action in contract, where they arise out of the same transaction, connected with the same subject, and affect all parties.[98]

[96] Stone v. Case, 124 P. 960, 34 Okl. 5, 43 L. R. A. (N. S.) 1168.

[97] Tootle v. Kent, 73 P. 310, 12 Okl. 674; Huey v. Starr, 101 P. 1075, 79 Kan. 781, rehearing denied 104 P. 1135, 79 Kan. 781.

In action for damages from mortgagee's breach of contract to make releases to purchasers from mortgagor, and to enjoin a foreclosure sale and to quiet title, there was no misjoinder of causes. Nelson v. Hoskinson, 172 P. 993, 103 Kan. 46.

Where proof showed mutual mistake of fact as to description of block on which insured property was, cause of action to reform policy was properly joined with action to recover for loss due thereunder. State Mut. Ins. Co. v. Green, 62 Okl. 214, 166 P. 105, L. R. A. 1917F, 663.

A cause of action for damages may be joined with one to abate the source of the injury as a nuisance. Drinkwater v. Sauble, 26 P. 433, 46 Kan. 170.

Under Rev. Laws 1910, § 4738, a party may unite a cause of action to recover real property and a cause of action for the value of the rents and profits thereof. Rodman v. Davis, 127 P. 411, 34 Okl. 766. In ejectment, the plaintiff may sue for rent due and foreclose his statutory landlord's lien by attachment proceedings. Id.

An action for the partition of real estate can be joined with an action for the recovery of the rents and profits thereof. Edde v. Pash-pah-o, 48 P. 884, 5 Kan. App. 115.

Where a petition seeks to dissolve a partnership and secure an accounting and the appointment of a receiver and distribution of the proceeds, and also seeks to recover damages for depreciation of a stock of goods and for loss of profits by reason of the closing of plaintiff's business and for the destruction of his financial standing, the causes are properly joined in the same petition, for the reason that all arise out of the same transaction connected with the same subject-matter. Tootle v. Kent, 73 P. 310, 12 Okl. 674.

[98] Summers v. Gates, 55 Okl. 96, 154 P. 1159.

Causes of action in tort may be joined in separate counts with causes of action in contract, when all arise out of the same transaction or transactions connected with the same subject-matter and affect all the parties. Aylesbury Mercantile Co. v. Fitch, 99 P. 1089, 22 Okl. 475, 23 L. R. A. (N. S.) 573.

A petition setting up several causes of action, which are all alleged to have resulted from defendant's failure to perform his duties as manager of a corporation, purchasing, selling, shipping, and handling grain, live stock, and other farm products, is not subject to demurrer on the ground of misjoinder of causes of action sounding in tort and on contract. Hoffman v. Farmers' Co-op. Shipping Ass'n, 97 P. 440, 78 Kan. 561.

Where the causes of action joined in one petition are all of the same class, and arose under the same statutory provisions, and the parties are the same, and the venue the same, and allegations, defenses, and relief sought are similar or the same, the only difference being in time and amount, such causes are properly joined.[99]

Where a course of wrongful conduct results in separate injuries, the injured party need not bring separate suits, but may recover all the damages in one suit.[1]

In an action for personal injuries, all the acts of negligence which caused the injury may be alleged in the same paragraph without constituting a misjoinder of causes of action.[2]

Causes of action to recover usury paid at different times on different loans may be joined in one petition, when separately stated and numbered.[3]

Causes of action for reformation and specific performance of the reformed instrument may be joined.[4]

That several persons, each of whom has a special interest in having a street kept open for travel, join in an action for that purpose, does not involve a misjoinder of causes of action.[5]

In a suit for commission, a real estate broker may join a count for reasonable value of his services with a count on a contract to pay a stated commission.[6]

A cause of action against a constable for a breach of the condition of his official bond, which is joint and several, may be joined in the same action with a cause of action against the sureties on such bond, for the same breach of the condition thereof.[7]

A bill by the widow of a deceased grantor as administratrix, and for herself, to declare a mortgage, purporting to be executed by her

[99] First Nat. Bank of Tishomingo v. Ingle, 132 P. 895, 37 Okl. 276.

Causes of action to recover usury paid at different times on different loans of the same class, and affecting the same parties, may properly be joined in one petition when separately stated and numbered (following State Bank of Paden v. Lanam, 34 Okl. 485, 126 Pac. 220). First Nat. Bank of Tishomingo v. Latham, 132 P. 891, 37 Okl. 286.

[1] Harrell v. Scott, 51 Okl. 373, 151 P. 1169.

[2] Enid Electric & Gas Co. v. Decker, 128 P. 708, 36 Okl. 367.

[3] State Bank of Paden v. Lanam, 126 P. 220, 34 Okl. 485.

[4] Painter v. Fletcher, 81 Kan. 195, 105 P. 500.

[5] Bissey v. City of Marion, 104 Kan. 311, 178 P. 611.

[6] Berry v. Craig, 91 P. 913, 76 Kan. 345.

[7] Schilling v. Black, 31 P. 143, 49 Kan. 552.

husband and herself, and recorded before their general warranty deed, a forgery, and that it was not a lien on the land, and for other relief, does not misjoin causes of action.[8]

A cause of action by a husband for fraud inducing exchange of land for corporate stock may properly be joined with his wife's cause of action for fraud in being induced to execute a mortgage on her separate property to secure her husband's obligations.[9]

An action against a sheriff for failing and refusing to levy an attachment, and an action for failing and refusing to levy an execution in the same case, after judgment, may be joined in the same petition.[10]

In an action against a warehouseman for loss of goods it is competent for the owner to set up his cause of action in two counts, one upon an express agreement as to the character of the storage building and the care exercised, and the other on the implied undertaking to provide a safe place.[11]

Except in actions to foreclose liens, several causes of action cannot be united in one petition, unless they all arise out of the same transaction, and are connected with the same subject of action, and affect all the parties.[12]

Several causes of action cannot be joined in one suit except in actions to enforce liens, unless each cause affects each party to the suit.[13]

In a chattel mortgagee's action against several for conversion of mortgaged property, a proposed amendment charging one defendant as a trustee of the proceeds of a sale did not affect all parties to

[8] Keys v. Mathes, 16 P. 436, 38 Kan. 212.

[9] Phillips v. Mitchell (Okl.) 172 P. 85, writ of error dismissed 248 U. S. 531, 39 S. Ct. 7, 63 L. Ed. 405.

[10] Chittenden v. Crosby, 48 P. 209, 5 Kan. App. 534.

[11] Locke v. Wiley, 105 P. 11, 81 Kan. 143, 24 L. R. A. (N. S.) 1117, 19 Ann. Cas. 241.

[12] Harrod v. Farrar, 74 P. 624, 68 Kan. 153; Gardner v. Board of Com'rs of City of Leavenworth, 94 Kan. 509, 146 P. 1000.

[13] Bryan v. Sullivan, 55 Okl. 109, 154 P. 1167.

Except in cases to enforce liens, it is a prerequisite to the joinder of causes of action in a pleading that all the causes should affect all the parties to the action. Benson v. Battey, 78 P. 844, 70 Kan. 288, 3 Ann. Cas. 283.

Under Code, § 83, permitting the joinder in the same petition of several causes of action affecting all the parties to the action, the petition is demurrable, the allegations as to one cause of action warranting relief to only one plaintiff. New v. Smith, 74 P. 610, 68 Kan. 807.

the action, and, as the two causes could not be united in one petition, was properly refused.[14]

Where, in mechanic's lien proceedings, plaintiff alleged in his petition a cause of action against the contractors, entitling him to a judgment upon their account for material furnished, and to a decree foreclosing his lien against the buildings of the owners, and also endeavored to allege and recover on a contract between him and the owners of the buildings, alleging that the owners agreed that they would pay the account of the contractors for the material furnished, there was a misjoinder of causes of action, and the court properly sustained a motion to strike out that part of the petition seeking to recover personal judgment against the owners.[15]

Claims affecting several defendants, which might have been

[14] First Nat. Bank v. City Nat. Bank of Wellington, Tex. (Okl.) 175 P. 253.

[15] Jones v. Balsley, 111 P. 942, 27 Okl. 220.

The joinder of civil actions, whether legal or equitable, is governed by Code Civ. Proc. § 83, and the test whether such causes of action fall within any of the classes specified in such section is to be determined by the provision that the causes of action so united must all belong to one of these classes and affect all the parties to the action, except in actions to enforce mortgages or other liens, and does not justify an action on notes given to secure loans made by a corporation for building a creamery, where plaintiff and one of the defendants signed all of the notes, and two of the defendants signed for the notes, and one signed three of the notes, and some of them were given in renewal. Mentzer v. Burlingame, 81 P. 196, 71 Kan. 581.

A cause of action against one party on a lease and one on a separate and distinct writing, wherein another party guaranties that a certain part of the rent will be paid, cannot be joined in a single action. Marshall v. Saline River Land & Mineral Co., 89 P. 905, 75 Kan. 445.

Two persons could not join in one action causes on an insurance policy for the loss of property part of which was owned by them jointly and part by each separately. State Ins. Co. of Des Moines, Iowa, v. Belford, 42 P. 409, 2 Kan. App. 280.

Where a cause of action arising out of a partnership transaction is joined with one arising out of an individual transaction, there is a misjoinder. Citizens' State Bank v. Frazee, 56 P. 506, 8 Kan. App. 638.

When the territorial board of equalization, in equalizing the returns of the several counties, raise a certain county 65 per cent. above its true value, and 450 persons join in a suit to restrain such raise as to their individual properties, there is an improper joinder; the causes of action being several, and not joint. Weber v. Dillon, 54 P. 894, 7 Okl. 568.

A cause of action against a board of county commissioners in favor of an ex-treasurer thereof, for an accounting and settlement of his accounts as such treasurer, cannot be joined with a cause of action in his favor against the sureties on his official bond, for wrongfully converting property deeded by

brought in a single suit in equity, may be regarded as one cause of action; but, when there is more than one primary right to be enforced, the petition is demurrable.[16]

The question whether more than one cause of action is stated sometimes presents difficulties, but, of course, a petition cannot be objectionable for misjoinder, if only one cause of action is stated.[17]

That there was a common grantor to deeds of different tracts of

him in trust for their protection as sureties. Riger v. Board of Com'rs of Davis County, 29 P. 595, 48 Kan. 389.

Where a grantor executes two separate deeds about the same time, one conveying land to one person, and the other conveying another tract to a different person, and the grantor's heirs bring proceedings against both grantees to set aside the deeds and partition the lands, there is an improper joinder of causes of action. Griffith v. Griffith, 81 P. 178, 71 Kan. 547.

In an action for partition of land in this state, amended petition making stranger to title a party, alleging that he claimed title and wrongfully excluded plaintiff from possession of land in another state, is demurrable on ground of misjoinder of causes of action. Caldwell v. Newton, 163 P. 163, 99 Kan. 846.

A petition in quo warranto by a private person, in the name of the state, averring a cause of action against the mayor, councilmen, and assessor of the city to disorganize the municipality, and one against the county clerk and county treasurer to enjoin the collection of a tax levied against plaintiff's property, contains two causes of action, which are improperly joined. State v. Shufford, 94 P. 137, 77 Kan. 263.

An owner of stock in a corporation secured the appointment of a receiver, and subsequently he and such receiver, who had been removed and another person appointed in his stead, sued the company and others, charging that the latter had conspired together to defraud the company of its property and such stockholder of his interest, and prayed that certain judgments be set aside, that all deeds executed by the substitute receiver and the other defendants be canceled, and that certain orders be vacated. Held, that such petition was multifarious, in uniting disconnected causes of action and in joining parties without a common interest. Fry v. Rush, 65 P. 701, 63 Kan. 429.

A cause of action in favor of plaintiff, and against one defendant, cannot be united with another cause of action in favor of the same plaintiff against another defendant, where neither defendant is interested in the cause of action alleged against the other. Atchison, T. & S. F. R. Co. v. Board Com'rs Sumner County, 33 P. 312, 51 Kan. 617.

An action by an executor against a coexecutor, asking for his removal, cannot be joined with an action for an accounting of a partnership in which the estate has an interest with another person not connected with the estate. Insley v. Shire, 39 P. 713, 54 Kan. 793, 45 Am. St. Rep. 308.

[16] Coody v. Coody, 136 P. 754, 39 Okl. 719, L. R. A. 1915E, 465.

[17] *Only one cause of action stated.*—A petition in replevin by the mortgagor and mortgagees of the property, although setting out different interests

antagonistic to the possession of defendant, states but one cause of action. First Nat. Bank of Russell v. Knoll, 52 P. 619, 7 Kan. App. 352.

A petition to recover for breach of promise of marriage and seduction states but one cause of action. Bowes v. Sly, 152 P. 17, 96 Kan. 388.

An action to reform a written contract so as to conform to the contract actually made, and to enforce said contract as reformed, constitutes but one cause of action. German Ins. Co. of Freeport v. Davis, 51 P. 60, 6 Kan. App. 268.

In an action for damages for an unlawful attachment, the petition charging that the attachment was wrongfully and maliciously obtained, states but one cause of action, and it is error to require plaintiff to elect whether he will proceed for the wrongful or for the malicious taking. Schwartzberg v. Central Ave. State Bank, 115 P. 110, 84 Kan. 581.

A petition alleging a verbal agreement to sell land without alleging or asking damages was held to state but one cause of action under which performance or, in default thereof, damages could be recovered. Naugle v. Naugle, 132 P. 164, 89 Kan. 622.

A petition, alleging the loss of a piano valued at $400, caused by failure to have it insured and by negligence causing fire, in which it was destroyed, and asking judgment for $400, stated but one cause of action. Stone v. Case, 124 P. 960, 34 Okl. 5, 43 L. R. A. (N. S.) 1168.

Appropriate allegations of execution of a guaranty of the performance of a contract, the default of the principal obligor and of guarantors state essentially but one cause of action against the principal and guarantors, and as against a demurrer there is no misjoinder of causes of action. Furst v. Buss, 104 Kan. 245, 178 P. 411.

In an action to quiet title involving validity of a conveyance of oil and gas, a petition alleging abandonment, and also that the instrument was fraudulently altered, and is void because not recorded within 90 days after execution, and not listed for taxation, states but one cause of action. Horville v. Lehigh Portland Cement Co., 105 Kan. 305, 182 P. 548.

A petition, in an action to set aside a deed as procured from an insane person by one with knowledge of his insanity, alleging that the deed was void because of the mental weakness of the grantor, and the undue influence exercised upon him while in that condition, and asking to have the deed adjudged void, states but a single cause of action. Bethany Hospital Co. v. Philippi, 107 P. 530, 82 Kan. 64, 30 L. R. A. (N. S.) 194.

Where the executors of an estate, who were also devisees under the will, together with certain other devisees, executed a mortgage on the estate, and the mortgage was subsequently twice renewed by new mortgages, and an extension of the last mortgage was granted, an action against the mortgagors personally to foreclose their interest in the estate was not subject to demurrer for misjoinder of causes of action. Shrigley v. Black, 53 P. 477, 59 Kan. 487.

A petition on a note executed by one defendant, which alleges the deposit of stock as collateral by another defendant, a sale and application of the proceeds, and a dispute as to the validity of the sale, and asks judgment for the balance due and barring defendants from any claim to the security, states but one cause of action. Hopkins v. Kuhn, 72 P. 270, 66 Kan. 619.

Where a lessee of gas lands drills wells on adjoining land, and through them drains the gas from the leased land, the fact that he wrongfully took the gas through the wells on the adjoining land does not prevent the re-

land to different grantees does not render an action to set aside both deeds and recover the land a single cause of action.[18]

A petition which alleges that defendant is indebted to plaintiff "to balance due, as per settlement," and also on an open, itemized account, states two separate causes of action.[19]

When the petition states three separate demands, the first two on promissory notes past due, and the third on an account not due, there is a misjoinder of actions.[20]

An action to recover damages against a number of defendants for a fraudulent conspiracy cannot be joined with an action to obtain a cancellation of a certificate of deposit owned and held by one of said defendants alone, even though such certificate was obtained as one of the fruits of the conspiracy.[21]

An action upon promissory notes cannot be properly joined with an action of replevin.[22]

Where two notes were given, each secured by a separate mortgage, and a third given to secure any deficiency there might be, it was not necessary, or even proper, to include such third mortgage in actions to foreclose the first two mortgages.[23]

An action for rent or damages, although arising out of the same transaction, cannot be joined in an action of forcible or unlawful detainer.[24]

There is a misjoinder in an alternative writ of mandamus, commanding the board of commissioners to canvass the petition of tax-

covery of all the royalties due in a single action. Culbertson v. Iola Portland Cement Co., 125 P. 81, 87 Kan. 529, Ann. Cas. 1914A, 610.

The petition, in an action against a physician for negligent treatment in an obstetrical case, has been held to state a single cause of action, though it alleged negligence of defendant both before and after the birth of the child. Yard v. Gibbons, 149 P. 422, 95 Kan. 802.

[18] Griffith v. Griffith, 81 P. 178, 71 Kan. 547.

[19] Eisenhouer v. Stein, 15 P. 167, 37 Kan. 281.

[20] Wurlitzer v. Suppe, 15 P. 863, 38 Kan. 31.

[21] Haskell County Bank v. Bank of Santa Fé, 32 P. 624, 51 Kan. 39.

[22] Galbreath v. Mayo (Okl.) 174 P. 517.

[23] Conklin v. Stackfleth, 69 P. 194, 65 Kan. 310.

[24] Hart v. Ferguson (Okl.) 176 P. 396.

An action of forcible entry and detainer, brought before a justice of the peace, cannot be joined with a claim for damages growing out of the same transaction, the proceeding being a summary one. Ow v. Wickham, 16 P. 335, 38 Kan. 225.

payers of one township with an order to fix the date of election for several other townships.[25]

MOTION TO CONSOLIDATE

(Caption to include title of both cases.)

Comes now the defendant in the above entitled actions, C. D., and respectfully shows to the court that both of said actions affect the same parties, and all of the same parties, both being brought by the plaintiff, A. B., against the defendant, C. D., and that the causes of action alleged in the petitions filed in said actions both belong to the same class and for that reason might be joined in one action.

Wherefore defendant moves the court that the plaintiff be required to show cause, if any there be, why said actions and causes of action should not be consolidated in one case, and that if no cause be shown, that said actions shall be consolidated.

X. Y., Attorney for Defendant.

(Notice of the above motion should be given to adverse party.)

MOTION TO REQUIRE SEVERANCE

(Caption.)

Comes now the defendant E. F., and moves the court to grant this defendant a severance herein and a separate trial of the issues between plaintiff and this defendant, for the reason that this is an action by plaintiff, A. B., against the defendants, C. D. and E. F., seeking to quiet title and to cancel a deed given by A. B. to C. D.; that this defendant, E. F., claims to be an innocent purchaser of a portion of the premises covered by said deed from the defendant, C. D.; and that in the event the issues between the plaintiff and the defendant C. D., should be found in favor of the defendant C. D., it would not be necessary to try the issues between the plaintiff and this defendant.

X. Y., Attorney for Defendant E. F.

§ 581. Separately stating and numbering

"Where the petition contains more than one cause of action, each shall be separately stated and numbered." [26]

[25] State v. Commissioners of Reno County, 16 P. 337, 38 Kan. 317.

[26] Rev. Laws 1910, § 4739.

For form of motion, see post, § 699.

That is, each of several causes of action set out in one petition should be separately stated and numbered, and proceed upon a single definite theory, and of itself present a complete cause of action distinct from the others.[27]

Plaintiff may number the paragraphs of his petition though it contains but a single count, or may number the paragraphs of each count where it contains one or more counts.[28]

Where he has two or more distinct and separate reasons for obtaining the relief asked, and there is some uncertainty as to the grounds of recovery, the complaint may set forth a single claim, or ask for the same relief in several distinct counts.[29]

He may, in separate counts, properly state his case in different ways, so as to meet each of the various aspects in which the evidence at the trial may possibly leave it.[30]

[27] First Nat. Bank of Tishomingo v. Ingle, 132 P. 895, 37 Okl. 276.

Under this section, each of several causes of action in the same petition should constitute a separate count or paragraph, separately stated and numbered, proceeding on a single definite theory, and presenting a complete cause of action. Chupco v. Chapman (Okl.) 160 P. 88.

[28] Burton v. Doyle, 48 Okl. 755, 150 P. 711.

[29] Carter Oil Co. v. Garr (Okl.) 174 P. 498; Harris v. Warren-Smith Hardware Co., 44 Okl. 477, 144 P. 1050.

Where the chief aim of a petition by tenants in common against a cotenant, is partition, allegations asserting right to accounting and to rents need not be separately stated and numbered unless so required by trial court. Cribb v. Hudson, 160 P. 1019, 99 Kan. 65.

In an action against a milling company and a railroad company for joint obstruction of a river to plaintiff's damage, caused by separate works of the defendants, it was error to require plaintiff to separately state and number his causes of action against the two defendants, since, if two or more parties, acting jointly, injure another, they are jointly and severally liable, and the injured party may at his option sue one or all of those contributing to the injury. Arnold v. C. Hoffman & Son Mill Co., 86 Kan. 12, 119 P. 373.

It is not improper to join, in the same count, an allegation that defendant took possession of personalty belonging to plaintiff and converted it to his own use with an allegation that he entered a hotel which plaintiff was carrying on, took possession of the building, closed same, and thereby destroyed plaintiff's business, where the goods alleged to have been converted were taken from the building at the same time and the entering of the building and the taking of personalty are parts of the same transaction. Wellington v. Spencer, 132 P. 675, 37 Okl. 461, 46 L. R. A. (N. S.) 469.

[30] Edwards v. Hartshorn, 82 P. 520, 72 Kan. 19, 1 L. R. A. (N. S.) 1050.

Plaintiffs may allege in one count a right to recover on a contract, and in another for money had and received, though both claims are founded on the same transaction. Van Arsdale-Osborne Brokerage Co. v. Foster, 100 P. 480, 79 Kan. 669.

§ 582. Where demurrer sustained

"When a demurrer is sustained, on the ground of misjoinder of several causes of action, the court, on motion of the plaintiff, shall allow him, with or without costs, in its discretion, to file several petitions, each including such of said causes of action as might have been joined; and an action shall be docketed for each of said petitions, and the same shall be proceeded in without further service." [31]

Where a demurrer containing several grounds is sustained generally, the filing of separate petitions may properly be permitted even without motion therefor.[32]

§ 583. Splitting

A single cause of action cannot be divided into several claims, and separate actions maintained thereon.[33]

An action for a tort is single and indivisible, and gives rise to but one liability.[34]

A balance due on an account running for more than two years constitutes only one cause of action.[35]

All the separate breaches of a single and entire contract after such breach has actually occurred constitute only one cause of action, and this although an action might be maintained upon each

[31] Rev. Laws 1910, § 4743.

[32] Weber v. Dillon, 7 Okl. 568, 54 P. 894, appeal dismissed 22 S. Ct. 931, 46 L. Ed. 1262.

[33] Tootle v. Kent, 73 P. 310, 12 Okl. 674; Akin v. Bonfils (Okl.) 169 P. 899.

A creditor who has a single cause of action for a sum of money cannot by assignment split up the cause of action, and thereby subject the debtor to a number of suits. German Fire Ins. Co. v. Bullene, 33 P. 467, 51 Kan. 764.

In an action by a plate glass insurer who had paid a loss from explosion of gas which defendant allowed to escape, held that a demurrer to insurer's evidence could not be sustained on the ground that there was a splitting of causes of action because insured had another right of action for injuries to floors, etc., from the explosion for such action could be consolidated or the parties brought in. Maryland Casualty Co. v. Cherryvale Gas Light & Power Co., 162 P. 313, 99 Kan. 563, L. R. A. 1917C, 487.

[34] Kansas City, M. & O. Ry. Co. v. Shutt, 104 P. 51, 24 Okl. 96, 138 Am. St. Rep. 870, 20 Ann. Cas. 255.

An entire claim arising from a single wrong cannot be divided and made the subject of several suits, however numerous the items of damages may be. Wichita & W. R. Co. v. Beebe, 18 P. 502, 39 Kan. 465.

[35] Tootle v. Wells, 18 P. 692, 39 Kan. 452.

of such breaches as it occurred, and before any subsequent breach occurred.[36]

Injury to a riparian owner from a municipal sewer system polluting a water course so as to constitute a nuisance, there being no negligence charged in its construction or operation, is a permanent injury for which but a single action may be maintained.[37]

An action to enjoin a trespass on one tract in plaintiff's possession, and a subsequent action for possession of another tract in defendant's possession before the commencement of the former action, were not upon a single cause of action within rule against splitting causes of action.[38]

A cause of action for construction and maintenance of railroad bridge and embankment, where the negligent condition is not permanent, arises at actual injury, and successive actions may be maintained for successive injuries.[39]

§ 584. Consolidation

"Whenever two or more actions are pending in the same court, which might have been joined, the defendant may, on motion and notice to the adverse party, require him to show cause why the same shall not be consolidated, and if no cause be shown, the said several actions shall be consolidated." [40]

Where plaintiffs, on bringing an action for the specific performance of a contract for the exchange of property, also brought replevin for personal property covered by the contract, the court may properly consolidate the two actions.[41]

[36] Whitaker v. Hawley, 1 P. 508, 30 Kan. 317.

[37] City of Mangum v. Sun Set Field (Okl.) 174 P. 501.

[38] Akin v. Bonfils (Okl.) 169 P. 899.

In suit for overflow caused by railroad bridge and embankment, negligent condition will not be held permanent if abatable by either labor or money, consistent with rightful use and maintenance of the structure. Pahlka v. Chicago, R. I. & P. Ry. Co., 62 Okl. 223, 161 P. 544.

[39] Pahlka v. Chicago, R. I. & P. Ry. Co., 62 Okl. 223, 161 P. 544.

[40] Rev. Laws 1910, § 4796.

Where two mechanics' liens were filed upon an entire tract, and other mechanics' liens were filed and mortgages were executed upon specific subdivisions of the same tract, and several actions were commenced in the district court to foreclose the mechanics' liens and the mortgages, it was held, that under Civ. Code, §§ 83, 636, it was proper to consolidate them for the purpose of trial. Van Laer v. Kansas Trip-Hammer Brick Works, 43 P. 1134, 56 Kan. 545.

[41] Akins v. Holmes, 133 P. 849, 89 Kan. 812.

The refusal to permit the consolidation of an action with another action in which another party is impleaded is within the discretion of the trial court.[42]

Where cases cannot be consolidated under the provisions of the statute, several cases upon the same general subject cannot be considered and determined by the same jury at the same time, if the parties object.[43]

Where parties consent to the consolidation of two separate actions and agree that they may be tried together, the jurisdiction of the court is the same as if one action containing all the issues of the consolidated case had been brought.[44]

§ 585. —— Order—Forms

"The order for consolidation may be made by the court, or by a judge thereof, in vacation." [45]

ORDER OF CONSOLIDATION

(Caption, to include titles of both cases.)

Now, on this ——— day of ———, 19—, this cause coming on to be heard on the motion of the defendant in the above entitled actions, C. D., that said actions be consolidated, the plaintiff being present by his attorney, G. H., and the defendant being present by his attorney, X. Y., and the court having heard the argument of counsel, and being fully advised in the premises, and it appearing to the court that at the time of filing said motion, the defendant gave notice thereof to said plaintiff, and notified the plaintiff to show cause why said actions should not be consolidated, if any there be, and no cause being shown, and it further appearing to the court that the causes of action alleged in the petitions filed in said actions both belong to the same class and for that reason might be joined in one action, and that both of said actions effect the same parties, and all of the same parties:

It is therefore by the court ordered that said actions be and the same are hereby consolidated and merged in one action, and that

[42] McCullough v. S. J. Hayde Contracting Co., 109 P. 176, 82 Kan. 734.

[43] Ortman v. Union Pac. Ry. Co., 4 P. 858, 32 Kan. 419.

[44] Phillips v. Mitchell (Okl.) 172 P. 85, writ of error dismissed 39 S. Ct. 7, 248 U. S. 531, 63 L. Ed. 405.

[45] Rev. Laws 1910, § 4797.

said action shall proceed as cause No. ——— in this court. It is further ordered that the pleadings be reconstructed, so that all of the plaintiff's causes of action shall be stated in one petition, and the answer of defendant present all the issues raised in the original suits. It is further ordered that the plaintiff pay the costs heretofore accrued in cause No. ———. ———, Judge.

ORDER TO SEPARATELY STATE AND NUMBER

(Caption.)

Now, on this ——— day of ———, 19—, this cause coming on to be heard on the motion of defendant to require the plaintiff to separately state and number the various causes of action alleged in his petition, the plaintiff being present by G. H., his attorney, and the defendant being present by X. Y., his attorney, the court, having heard the argument of counsel and being fully advised in the premises, finds that said petition alleges more than one cause of action, and that said causes are not separately stated and numbered.

It is therefore by the court ordered that said plaintiff be and he is hereby ordered and required to separately state and number the various causes of action alleged in his petition, and that said plaintiff be given ——— days from and after this date in which to file his amended petition herein, to which ruling of the court the plaintiff duly excepted, which exceptions were by the court allowed.

———, Judge.

Division IV.—Exhibits and Prayer

§ 586. Exhibits

"If the action, counterclaim or set-off be founded on account or on a note, bill, or other written instrument as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading. If not so attached and filed, the reason thereof must be stated in the pleading. But if the action, counterclaim or set-off be founded on a series of written instruments executed by the same person, it shall be sufficient to attach and file a copy of one only, and in succeeding causes of actions or defenses, to set forth in general terms descriptions of the several instruments respectively." [46]

[46] Rev. Laws 1910, § 4769.
For form of exhibits, see ante, § 579.

When an exhibit is made a part of the petition, reference may be had to the exhibit to determine whether a cause of action has been stated, so as to withstand a general demurrer.[47]

[47] Long v. Shepard, 130 P. 131, 35 Okl. 489; State v. School Dist. No. 3, 8 P. 208, 34 Kan. 237; Grimes v. Cullison, 41 P. 355, 3 Okl. 268.

In suit on instrument in writing for payment of money, where copy of instrument is attached to petition, such copy should be considered when construing allegations of pleading on demurrer. Davis v. Board of Com'rs of Choctaw County, 58 Okl. 77, 158 P. 294, L. R. A. 1916F, 873.

Where, in an action on a life policy, a copy of the policy is attached to the petition and made a part thereof, it should be considered when construing the petition on demurrer. Friend v. Southern States Life Ins. Co., 58 Okl. 448, 160 P. 457, L. R. A. 1917B, 208.

Where a life policy provides that it shall be incontestable after two years from date of issue, such provision is not a waiver, but a condition, and is sufficiently pleaded where a copy of the policy is attached to the petition as an exhibit. Mutual Life Ins. Co. of New York v. Buford, 61 Okl. 158, 160 P. 928.

Where employé, after injury, delivered to his employer a sworn statement of the circumstances, and brought an action for damages, and attached the sworn statement to his petition as an exhibit and made it a part thereof, and it clearly showed that plaintiff was guilty of contributory negligence, the pleading was insufficient to sustain a recovery. Atchison, T. & S. F. Ry. Co. v. Schroll, 92 P. 596, 76 Kan. 572.

A cross-petition, alleging an agreement between decedent and wife and the cross-petitioner's father for her benefit, "evidenced by a written instrument" attached to cross-petition, showing that it was executed only by the father, was properly construed as stating cause of action founded on parol agreement. Jacks v. Masterson, 160 P. 1002, 99 Kan. 89.

Where a petition for a writ of habeas corpus had attached to it a parole granted to petitioner and accepted by him and a revocation thereof which recited that the Governor was within the state when the parole was granted by the Lieutenant Governor, the petitioner was bound by such recital. Ex parte Hawkins, 136 P. 991, 10 Okl. Cr. R. 396.

In an action on a supersedeas bond, a petition which recites the execution of the bond, the action in which it was given, the condition, and the liability thence arising, and then refers to a copy of the bond which is attached to, and made a part of, the petition, is sufficient, under Comp. Laws, c. 80, § 118, providing that a copy of the written instrument upon which an action is founded, as an evidence of indebtedness, must be attached to, and filed with, the petition. Walburn v. Chenault, 23 P. 657, 43 Kan. 352.

A petition alleged the negligent adoption by the board of county commissioners of defective plans for a bridge, in consequence of which plaintiff's husband, while working under the bridge while it was building, was killed by the fall of the structure. The verdict of the coroner's jury was attached to the petition, in which the cause of death was found to be an "accidental falling of a stone-arch bridge." Held, that the finding of the coroner's jury, made a part of the petition, did not narrow the alleged cause of the death so as to confine it to an unforeseen and fortuitous circumstance. Board of Com'rs of Cloud County v. Vickers, 61 P. 391, 62 Kan. 25.

It is not good practice to make a mere exhibit a part of the petition, the better mode being to make a direct statement of the facts.[48]

That is, the substance of the terms of a written instrument sued on should be set out in the petition, and not merely attached by copy.[49]

In an action on a note, the original note, or a copy thereof, with the indorsements, if any, must be filed as a part of the complaint.[50] But a complaint which seeks only to foreclose a mortgage and not judgment on the note secured need not exhibit it.[51]

In an action on a note by an indorsee, where the copy of the note set out in the complaint does not show the indorsement by the payee to plaintiff, the complaint is bad on demurrer, though such indorsement is alleged.[52]

A judgment is such an instrument as is required to be set out by copy.[53]

A written demand for the return of usury is not a "written instrument as evidence of indebtedness." [54]

A copy of a bill of lading is not required to be attached to the petition in an action for injuries to a shipment of live stock.[55]

It is not error to strike out exhibits to an answer containing allegations permitting the introduction of evidence in support of the proposition contained in the exhibit, which are merely cumulative, and the striking out of which does not deprive the pleader of any substantial right, or prevent him from making any proper defense which he may have.[56]

The allegations of a petition must be construed in connection with the exhibits attached and referred to therein.[57]

Letters attached to petition in action for specific performance

[48] Long v. Shepard, 130 P. 131, 35 Okl. 489.

[49] Minnetonka Oil Co. v. Cleveland Vitrified Brick Co., 48 Okl. 745, 150 P. 712.

[50] First Nat. Bank v. Jones, 37 P. 824, 2 Okl. 353.

[51] Tracey v. Crepin, 138 P. 142, 40 Okl. 297.

[52] First Nat. Bank v. Jones, 37 P. 824, 2 Okl. 353.

[53] Oberlin Loan, Trust & Banking Co. v. Kitchen, 57 P. 494, 8 Kan. App. 445.

[54] Texmo Cotton Exch. Bank v. Liston, 61 Okl. 33, 160 P. 82.

[55] Chicago, R. I. & P. Ry. Co. v. Harrington, 44 Okl. 41, 143 P. 325.

[56] Deming Inv. Co. v. McLaughlin, 30 Okl. 20, 118 P. 380.

[57] Southern Surety Co. v. Chambers (Okl.) 180 P. 711.

In an action on a contract, an exhibit was attached to the petition, show-

of a contract for conveyance of land showing the alleged contract, if in conflict with petition, must control in determining whether an enforceable contract was made.[58]

A copy of the mortgage involved attached to and made a part of the petition in a foreclosure suit controls all general recitals of the petition at variance with the copy, and if the land affected be misdescribed in the petition a correct description in the copy governs.[59]

An answer alleging that a contract was "made and entered into," and having attached a copy thereof, sufficiently alleges that it was "executed," so as to require a verified denial.[60]

§ 587. Prayer

Prayer for relief is not conclusive as to character of petition, nor as to relief that plaintiffs may be allowed.[61] But it may be considered in determining the relief actually sought by the pleader.[62]

In actions for the specific performance of a contract, it is the well-established practice to ask, in the alternative, for money damages if the court finds it inequitable or impossible to compel specific performance.[63]

ing that some of the items were furnished outside of the contract. No objection was made before trial. Held that, since the defect could have been remedied by amendment, there was no objectionable variance in rendering judgment on the contract, and also on a quantum meruit. El Reno Electric Light & Telephone Co. v. Jennison, 50 P. 144, 5 Okl. 759.

[58] Bowker v. Linton (Okl.) 172 P. 442.

[59] Sharp v. McColm, 101 P. 659, 79 Kan. 772.

[60] Limerick v. Barrett, 43 P. 853, 3 Kan. App. 573.

[61] Myler v. Fidelity Mut. Life Ins. Co. of Philadelphia, 64 Okl. 293, 167 P. 601.

Where petition states facts constituting a cause of action for maintaining a public nuisance, held immaterial that plaintiff did not demand the precise relief to which he was entitled, or the true rule of damages. Colbert v. City of Ardmore, 122 P. 508, 31 Okl. 537.

The prayer of a petition forms no part of it, and relief may be granted in accordance with the facts stated in the petition rather than pursuant to the prayer. Smith v. Smith, 73 P. 56, 67 Kan. 841.

[62] Rochester v. Wells Fargo & Co. Express, 123 P. 729, 87 Kan. 164, 40 L. R. A. (N. S.) 1095.

[63] Brush v. Boyer, 104 Kan. 168, 178 P. 445.

For form of prayers in petitions, see ante, § 579.

ARTICLE V

ANSWER

Division I.—Answer in General

Sections

588. Contents—Forms.
589. Construction.
590. Joinder.
591. Matters necessary to plead.
592. Affirmative defenses—Forms.
593. Fraud—Form.
594. Limitations—Form.
595. Pleading defenses in action on note.
596. Pleading attachment or garnishment.
597. Defenses in replevin.
598. Adverse possession.
599. Inconsistent defenses.
600. Negative pregnant.
601. Defense in libel and slander.
602. Supplemental answer.

Division II.—General Denial

603. Effect and sufficiency.
604. Disclaimer—Form.
605. Must be entered for whom.
606. Effect—By guardian ad litem.

Division III.—Verified Denial

607. Verification in general.
608. Who may verify.
609. How made—On belief.
610. Execution of written instruments—Indorsement.
611. Appointment or authority.
612. Account.
613. Corporation and partnership.
614. Waiver.
615. Forms.

Division IV.—Counterclaim and Set-off

616. Counterclaim—Nature—Right to interpose—Set-off—Limitations.
617. Set-off—Right to interpose.
618. Defined and distinguished—Statute applied.
619. Subsisting right.
620. Equity.
621. Cross-bill or cross-petition.
622. Landlord and tenant.
623. Action against United States.
624. Cross-demands—Deprivation.
625. Assignments.

Sections
626. Definition.
627. Parties and mutuality.
628. New party—Counterclaim.
629. New party—Set-off.
630. Form and requisites.
631. Notice.
632. Waiver.
633. Withdrawal.
634. Neglect to claim—Cost.
635. Forms.

DIVISION V.—UNAUTHORIZED PLEAS

636. Plea in abatement.
637. Plea in bar.

DIVISION I.—ANSWER IN GENERAL

§ 588. Contents—Forms

"The answer shall contain:

"First. A general or specific denial of each material allegation of the petition controverted by the defendant.

"Second. A statement of any new matter constituting a defense, counterclaim or set-off, or a right to relief concerning the subject of the action, in ordinary and concise language, and without repetition.

"Third. When relief is sought, the nature of the relief to which the defendant supposes himself entitled. The defendant may set forth, in his answer, as many grounds of defense, counterclaim, set-off, and for relief, as he may have, whether they be such as have been heretofore denominated legal, or equitable, or both. Each must be separately stated and numbered, and they must refer, in an intelligible manner, to the causes of action which they are intended to answer." [64]

[64] Rev. Laws 1910, § 4745.

The defendant may plead all grounds of defense, whether legal or equitable, and need not elect between them. Garfield Oil Co. v. Champlin, 78 Okl. 91, 189 P. 514.

Where there was no agreement that the award should be made a rule of court, the objection that the award exceeded the power of the arbitrators, or omitted to decide a matter submitted, could be made by answer in an action on the award. Clark v. Goit, 41 P. 214, 1 Kan. App. 345.

Sufficiency of answers.—An answer setting up a bar to a former action showing that the suit was for the same cause of action between the same parties, and that judgment was rendered on the merits by the court having ju-

ANSWER IN SUIT TO CANCEL CONVEYANCES

(Caption.)

Come now the said defendants, J. D., R. H., and F. E., by ———, their attorneys, and for their joint and several answers to the petition of the plaintiffs, as amended by interlineation and insertions, allege and state:

risdiction of the parties and the subject-matter, and that the judgment had not been appealed from, is good. Cowan v. Maxwell, 111 P. 388, 27 Okl. 87.

Answer in an action against an indorser held to present a good defense, where usury was pleaded. Ladd v. Ardmore State Bank, 143 P. 170, 43 Okl. 502.

In an action for the price of trees, an answer alleging that plaintiff's agent informed defendant that it would take 5,000 trees to plant defendant's tract, that thereupon he signed an order for such number, and that a much smaller number was required than estimated, stated a good defense. Mt. Hope Nurseries Co. v. Jackson, 128 P. 250, 36 Okl. 273, 45 L. R. A. (N. S.) 243.

Allegation in answer that if defendant was liable for plaintiff's injuries, his right and defendant's liability were regulated by federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), stated proposition of law and did not controvert allegations of petition nor raise any issue. Wichita Falls & N. W. Ry. Co. v. Puckett, 53 Okl. 463, 157 P. 112.

Where defendant in a suit by a foreign corporation answers to the merits, he admits the capacity of plaintiff to sue, and where defendant filed a supplemental answer alleging that plaintiff had not complied with the Statutes of Oklahoma, a demurrer to such supplemental answer was properly sustained. Kibby v. Cubie, Heimann & Co., 137 P. 352, 41 Okl. 116.

Where defendant in a suit on a foreign judgment answered that he had not been served with summons, and attached a copy of the judgment showing want of service and that he had not appeared, the answer was not demurrable. Rogers v. Presnall, 124 P. 37, 32 Okl. 834.

Ejectment.—Where plaintiff in ejectment alleged that he owned the land and was entitled to possession thereof, and that defendant was unlawfully keeping him out of possession, an answer denying generally the averments on the petition was sufficient. Wiggins v. Powell, 152 P. 765, 96 Kan. 478.

Equity.—In an action for the reformation of a deed of a deceased minor Cherokee freedman, neither an allegation that the allotment was generally understood to be a new acquisition and would descend as such, nor an allegation that the grantor's interest in the decedent's property was considered and recognized by all parties concerned as a life estate only, constituted a sufficient plea of mistake in the execution of the deed. Thraves v. Greenlees, 142 P. 1021, 42 Okl. 764.

In an action to enforce specific performance of a contract to exchange realty, held, that an indefinite plea supported by no evidence that plaintiff's title was incumbered so that the title was unmerchantable presented no defense. Spaeth v. Kouns, 148 P. 651, 95 Kan. 320, L. R. A. 1915E, 271.

Answer in suit to foreclose mortgage setting up extension of time of payment held not subject to demurrer. Roe v. Fleming, 122 P. 496, 32 Okl. 259.

An answer, alleging that a grantor intended to convey, and the grantee to take, only a life estate under a deed purporting to convey in fee simple, held

That said defendants admit that the said plaintiffs are husband and wife and that they were such at all the times mentioned in said petition and that they reside in ——— county, Oklahoma.

That said defendants admit that the said plaintiff A. M. is a member of the Creek Nation, and allege that he is duly enrolled on the official Indian rolls as an adult Creek Indian of one-eighth

to state no defense to an action by the grantee or his assigns to quiet title against a defendant claiming title to the remainder, where it did not allege fraud or mistake in the execution of the deed. Bell v. Bancroft, 55 Okl. 306, 155 P. 594.

Bonds.—Answer pleading defense to action on redelivery bond in attachment held sufficient against motion for judgment. Fritts v. Reidel, 165 P. 671, 101 Kan. 68.

Where by a bond given the sheriff in attachment it appeared that the obligor sought to save such officer as against persons claiming the property seized, and in an action thereon it was alleged that in a suit against the sheriff judgment was rendered against him, which he has been compelled to pay, the petition will be sustained as against a general demurrer. Tucker v. Smith, 68 P. 40, 65 Kan. 551.

In an action to recover upon an undertaking given to secure the discharge of attached property and the restoration of such property to the defendant, the condition of which is "that the defendant will perform the judgment of the court in said action," it is a sufficient allegation of a breach of the conditions of the undertaking to aver that the plaintiff obtained a judgment against the defendant in such action, what the amount of such judgment was, and that said judgment was unpaid, in whole or in part. Winton v. Myers, 58 P. 634, 8 Okl. 421.

In an action on a forthcoming bond an unverified general denial admits the execution of the bond, but puts in issue an allegation in the petition that the property was delivered to the defendant when the bond was approved, and an allegation that defendant had removed the attached property from the territory and failed to surrender it to satisfy the judgment pursuant to the terms of the bond. Dunn v. Claunch, 78 P. 388, 15 Okl. 27.

In an action on an undertaking given in an attachment case, under St. 1893, § 4107, to secure the release of the attached property, it is necessary to aver and show by the evidence that the attached property was restored to the defendant, or there can be no recovery. Drovers' Live Stock Commission Co. v. Custer County State Bank, 91 P. 850, 19 Okl. 302.

Insurance.—In an action on a mutual benefit certificate, an answer alleging generally that assured complied with all requirements to effect a change of beneficiary held to state a defense as against a general demurrer. Janeway v. Norton, 61 Okl. 185, 160 P. 908.

Answer, in an action on a fire policy authorizing cancellation for the taking out of additional insurance without permission, held demurrable. St. Paul Fire & Marine Co. v. Bragg, 137 P. 715, 41 Okl. 146.

A breach of a provision of a fire policy that the insured will keep a faithful record of all cotton received and taken away, being defensive matter, is properly set up by answer and issue joined thereon by reply. Scottish Union & National Ins. Co. v. Moore Mill & Gin Co., 143 P. 12, 43 Okl. 370.

(⅛) Indian blood, and they admit that the lands described in said petition were duly allotted and conveyed to him as a member of said Creek Nation, but they further allege and state that the restrictions upon the alienation of all of said lands expired or were long before the transactions set out in said petition.

The said defendants admit that all the defendants in the above entitled action are residents of ——— county, Oklahoma.

The said defendants admit that, on or about July 2, 1914, the said defendant J. D. did secure from the said plaintiffs a six months' option to buy an undivided one-half (½) interest in the said lands described in the said petition at a price of $30,000, and that Exhibit A to said petition is a true and correct copy of said option contract; but said defendants allege and state that the said lands were chiefly valuable for oil and gas, and that it is provided in said option contract that any conveyance of said lands that might be made thereunder should be subject to a prior oil and gas lease covering said lands and then owned by C. B. S.

The said defendants admit that, on or about November 7, 1914, the said defendant J. D. did procure from the said plaintiffs a warranty deed conveying to the said defendant J. D. an undivided one-fourth (¼) interest in and to the lands described in said petition, and they admit that Exhibit B to said petition is a true and correct copy of said deed, and that Exhibit C to said petition is a true copy of said contract executed by the said defendant J. D. to the said plaintiffs, in connection with said deed; but said defendants allege and state that, at the time of the execution of said warranty deed, C. B. S. held a valid, legal, and subsisting oil and gas lease upon said lands, which lease was, in said deed, expressly excepted from the covenant of warranty therein, and that said lands were chiefly valuable for oil and gas.

The said defendants deny that the said defendant J. D. has drawn all the royalty from the lands described in said contract of November 7, 1914, and said contract of July 2, 1914, and they allege and state the truth to be that, up to date of March 28, 1916, the said J. D. drew only one-eighth (⅛) of said royalties, and that, up to said date, the full one-eighth (⅛) of said royalties was paid to the said plaintiffs, in accordance with his said contract with them, a copy of which is attached to the said petition herein as Exhibit C, and that, after said date of March 28, 1916, the said defendant, J. D., at the special request of said plaintiff A. M. drew the full one-

fourth (¼) part of said royalties, and, in accordance with his said contract, promptly and regularly paid over to the said plaintiffs one-half of the said royalties so received by the said J. D.; and the said defendants admit that, up to the bringing of the action herein, the said J. D. had received and retained for himself and these answering defendants, of said royalties, about the sum of $7,300, and they state that a like amount of said royalties had been paid to and received by the said plaintiffs.

The said defendants admit that the said defendant J. D. duly conveyed to the said defendants R. H. and F. E. an undivided one-sixteenth (1/16) interest in and to the lands described in said petition, by warranty deed, a true and correct copy of which is attached to said petition as Exhibit F.

The said defendants deny each and every allegation contained in said petition, except the allegations thereof which they have herein above expressly admitted, and they further especially deny that in any of the transactions set out in said petition, the said P. C. or the said defendant F. S. ever acted as the agent of the said defendant J. D., or as the agent of any of these answering defendants. They deny that the said defendant J. D., or any of these answering defendants, ever entered into any conspiracy with the said F. S. or P. C., or with any other person or persons, to procure the execution of the contracts and warranty deed mentioned above. They expressly deny that any of said instruments were procured without consideration or through fraud, or by the exercise of any undue influence upon the said plaintiffs or upon either of them; and they further especially deny that, by reason of the long use of intoxicating liquors or for any other reason, the mind of the said plaintiff A. M. was so weakened that he did not fully comprehend the effect of his said contracts with and deed to the said defendant J. D.; but, on the contrary, the said defendants allege and state the truth to be that the said plaintiff A. M. clearly comprehended and understood the full import and force and effect of said contracts and deed at the dates of their execution, and has at all times, since the execution thereof, fully comprehended and understood the full import and force and effect of said instruments.

For their further answer to said petition, the said defendants deny that the said plaintiff, A. M., or that either of said plaintiffs,

has only recently discovered the facts attending the execution and delivery to the said defendant J. D. of the said option contract and the said warranty deed, and of the said contract executed in connection with said deed, and true and correct copies of which are attached to the petition of said plaintiffs as Exhibits A, B and C; but said defendants state the truth to be that the said plaintiff A. M. and his said coplaintiff knew and fully understood all the facts and circumstances in relation thereto at the time of the execution of same, and have ever since fully known and understood all said facts and circumstances; and the said defendants allege and state that said plaintiffs have been guilty of such laches that they are no longer entitled to maintain the action herein, and the said defendants expressly plead that the said action herein of the said plaintiffs is barred by their said laches.

These answering defendants, and each of them, specifically deny every allegation of new matter contained in the plaintiffs' petition, as amended by interlineation and insertion in accordance with the order of this court granting leave to the plaintiffs to so amend, made and entered on the 4th day of September, 1917, and further specifically deny any conspiracy between these defendants, or any of them, or any fraudulent transactions or dealings of any kind on their part with the said plaintiffs, or either of them.

Premises considered, the said defendants pray judgment that they be hence dismissed with their costs, and that they may have all other and further relief.

———,

By ———, Attorneys.

State of Oklahoma, }
County of ———. } ss.:

J. D., of lawful age, being first duly sworn, upon oath states: That he is one of the defendants named in the above and foregoing answer; that he has read said answer and knows the contents thereof; and that the statements and matters therein set out are true and correct, except such matters and statements as are made on information and belief, and those he believes to be true.

J. D.

Subscribed and sworn to before me this ——— day of ———, 19—.

(Seal.) ———, Notary Public.

My commission expires January 5, 1920.

ANSWER IN DAMAGE SUIT—PERSONAL INJURY

(Caption.)

Separate Answer of Defendant

Comes now the defendant C. D., and for his separate answer to plaintiff's petition filed herein says:

1. The said defendant denies generally and specifically each, all, and every of the allegations in said petition contained, except such as are hereinafter specifically admitted.

2. Further answering, and for further defense, the said defendant alleges that, if any injuries were sustained by the said F. B., they were due to his own negligence and want of care, in this, to wit:

That on or about ———, 19—, while his codefendant was driving and operating her automobile in a proper and careful manner westward on ——— street, between ——— street and ——— street, east of the alley, in ———, Oklahoma, the said F. B., riding a bicycle, emerged from a point between two automobiles parked on the north side of ——— street in front of the X. Y. Apartments; that as the said automobile approached the said point the said F. B. suddenly, and without giving notice or warning of his approach, and without keeping a lookout for any person or vehicle which might be approaching, negligently and carelessly rode his bicycle from the north side of ——— street from the point aforesaid, in a southeasterly direction, to a point directly in front of and against the said automobile; that the said negligent and careless act of the said F. B. was the proximate and contributing cause of the alleged occurrence, accident, or injury, without which act the same would not have occurred.

3. This defendant further alleges that the acts of the said F. B. in riding his bicycle as aforesaid were in violation of the following ordinances of the city of ———, which were in force on ———, 19—, to wit: (Here set forth ordinances violated.)

The defendant, therefore, prays judgment that he be dismissed, and for his costs and all other proper relief.

———, Attorneys for Defendant C. D.

§ 589. Construction

The answer should be construed liberally, with a view to substantial justice.[65]

§ 590. Joinder

A defendant may join in his answer as many grounds of defense, counterclaim, or set-off as he may have, whether they are such as have heretofore been denominated legal or equitable or both, when they arise out of the contract or transaction set forth in the petition, or are connected with the subject of the action, and when the relief asked for is necessary for the complete determination of the question involved in the action.[66]

§ 591. Matters necessary to plead

The filing of a demurrer or other plea does not preclude setting up in the answer the failure of a foreign corporation to comply with the statute before doing business in the state.[67]

In fact such failure should be pleaded in the answer.[68]

Where a former adjudication is relied on as a defense, it should be made to appear by the pleadings.[69]

[65] Rev. Laws 1910, § 4766.

Answer in action for personal injuries, which only denies that injury was caused by negligence of defendant, and alleges that it was wholly caused by negligence of plaintiff, does not plead contributory negligence. Colonial Refining Co. v. Lathrop, 64 Okl. 47, 166 P. 747, L. R. A. 1917F, 890.

The answer in an action to establish a parol trust in land conveyed by deed absolute in form put in issue the existence of the written instrument relied on by plaintiff, as well as the fact of the trust. Chandler v. Roe, 46 Okl. 349, 148 P. 1026.

In action for death of cattle from negligence of carrier in dipping them held, in view of allegations of answer, that defendant could not urge that shipment was an interstate one, governed by federal law. Missouri, K. & T. Ry. Co. v. Williamson, 75 Okl. 36, 180 P. 961.

[66] Minneapolis Threshing Mach. Co. v. Currey, 89 P. 688, 75 Kan. 365.

[67] Bailey v. Parry Mfg. Co., 59 Okl. 152, 158 P. 581.

[68] Bailey v. Parry Mfg. Co., 59 Okl. 152, 158 P. 581.

[69] James McCord Co. v. Johnson Grocery Co. (Okl.) 172 P. 438.

Sufficiency.—In a second action against minor children of a deceased Choctaw allottee to quiet title to a life estate and to enjoin execution of judgment in former action, plea of res adjudicata held good. Sweeney v. Coleman (Okl.) 169 P. 495.

In an action to enjoin the taxation, as personal property, of the grantor's right under his deed to receive an annual payment from grantee, prior adju-

Where the statute directs a mine foreman to do certain things, and his nonperformance thereof is relied on by mine company as a defense to his action for damages, the answer should allege and show that he was within class of persons contemplated by statute.[70]

Where a sheriff is sued for taking and carrying away plaintiff's property, and disposing of it, under an execution and judgment, he must plead that the property was taken under a valid execution and judgment, and must show that the property was taken under a valid writ, issued by a court of competent jurisdiction, and describing the property taken with sufficient certainty to identify it.[71]

In an action on a bond guaranteeing an employer against larceny or embezzlement by an employé, payment of the amount of a defalcation by the employé is a defense which must be pleaded to be available.[72]

In proceedings in bankruptcy, brought by creditors of the alleged bankrupt, the alleged bankrupt must deny the allegation in the petition of insolvency, and on his failure so to do the allegation is admitted.[73]

§ 592. Affirmative defenses—Forms

Defenses which assume or admit the original cause of action alleged, but which are based on subsequent matters qualifying or defeating it, must ordinarily be pleaded.[74]

dication against its taxability held sufficiently pleaded. Phillips v. Springer, 172 P. 1017, 103 Kan. 108.

A plea of res judicata, showing the pleadings, findings of fact, conclusions of law, and judgment in the former action, shows thereby the issues and facts determined in such suit, and in whose favor they were determined, without further allegations for that purpose. Dixon v. Caster, 70 P. 871, 65 Kan. 739.

70 Sandals v. Mizpah Mining Co. (Okl.) 168 P. 808.

71 Masters v. Teller, 56 P. 1067, 7 Okl. 668, 8 Okl. 271.

72 Oklahoma Sash & Door Co. v. American Bonding Co., 153 P. 1151.

73 In re American Pub. Co., 79 P. 762, 15 Okl. 177; Appeal of Western Paper Co., Id.

74 Continental Gin Co. v. Arnold, 52 Okl. 569, 153 P. 160.

In an action for the value of material furnished to the defendant board of education, held that, if the material was ordered without the approval of the board, such fact constituted an affirmative defense which must be pleaded by defendant. Board of Education of City of Clinton v. Houilston, 51 Okl. 329, 151 P. 1035.

Accord and satisfaction and transactions allied thereto to be available as defenses must be specifically pleaded.[75]

The defense of contributory negligence, in an action against a city for personal injury from alleged unsafe condition of street or sidewalk, is an affirmative defense, which must be pleaded and proved.[76]

The defense of an "act of God" in actions of negligence must be pleaded, being a special defense.[77]

Payment is a matter of defense and must be pleaded and proved by him who claims it.[78]

The defense of usury is waived unless specifically pleaded.[79] It cannot be raised by demurrer to a petition which declares on an usurious contract.[80]

Clauses of Answers—Affirmative Defenses—Accord and Satisfaction—Contributory Negligence—Act of God—Payment—Forms

ACCORD AND SATISFACTION

That after the sale and delivery of said goods the plaintiff agreed to accept, in full satisfaction and discharge of the claim of plaintiff alleged in his petition herein, the promissory note of the defendant for the sum of $———, payable on or before the ——— day of ———, 19—, and that thereupon the defendant executed and delivered said note to the plaintiff, and that the plaintiff then and there accepted and received the same in full satisfaction and discharge of the claim sued upon herein.

CONTRIBUTORY NEGLIGENCE

That at the time the plaintiff received said injuries of which he complains in said petition, and immediately prior thereto, he, said plaintiff, was guilty of contributory negligence whereby the said

[75] Continental Gin Co. v. Arnold, 52 Okl. 569, 153 P. 160.

[76] City of Cushing v. Bowdlear (Okl.) 177 P. 561.

[77] Sand Springs Ry. Co. v. Baldridge, 60 Okl. 102, 159 P. 487.

[78] Ince Nursery Co. v. Sams (Okl.) 177 P. 370; Standard Fashion Co. v. Joels, 60 Okl. 195, 159 P. 846.

[79] Stockyards State Bank v. Johnston, 52 Okl. 32, 152 P. 585.

[80] Id. Usury must be specially pleaded, and, where the defense is waived by defendant setting up other matters of defense, that the contract sued on provides for interest in excess of the legal rate will not justify the court in finding the same usurious, requiring the forfeiture of all interest. Ætna Building & Loan Ass'n v. Randall, 99 P. 655, 23 Okl. 45.

alleged injuries were caused and occasioned, and at said time the said plaintiff so placed himself upon the train and car, and so moved thereon, and remained in such position, when he knew or by the exercise of ordinary care might have known, that upon the coupling of said cars the same would be jarred and suddenly moved, and while in said position, and so negligent as aforesaid, and in disregard of all precautions on his part for his own safety, the said plaintiff received the injuries aforesaid by reason of his negligence aforesaid.[81]

ACT OF GOD

For further answer to said petition, defendant says that the death of plaintiff's husband, at the time and place stated in her petition, was solely the result of a sudden, unusual, unprecedented, unforeseen, and extraordinary storm then and there prevailing on the line of the railroad of defendant, which rendered it impossible to prevent said injury and death.

PAYMENT

That before the commencement of this action, the defendant fully satisfied the plaintiff's claim and demand sued on in this action, by payment thereof on the ——— day of ———, 19—, and the plaintiff received and accepted the same in full satisfaction of his said claim.

§ 593. —— Fraud—Form

Fraud, as a defense to an action on contract, cannot be pleaded in general terms; the specific acts constituting the fraud must be set forth.[82]

FRAUD AS AFFIRMATIVE DEFENSE IN ANSWER

That at the time of the execution of said instrument in writing said plaintiff falsely and fraudulently represented to defendant that

[81] Form in K. C. M. & O. Ry. v. Loosley, 76 Kan. 103, 90 Pac. 990.

[82] Fire Extinguisher Mfg. Co. v. City of Perry, 58 P. 635, 8 Okl. 429.

In an action on a note and to foreclose a chattel mortgage, an answer alleging that they were procured by fraud, and setting forth the fraudulent acts which were the sole inducement to their execution, and that plaintiff, who purchased before maturity, had knowledge of the fraud, states a sufficient defense. Hankins v. Farmers' & Merchants' Bank, 141 P. 272, 42 Okl. 330.

said plaintiff wished to borrow money for his own use, and that, if defendant would execute said instrument in writing, he, plaintiff, could borrow money thereon; that plaintiff falsely and fraudulently stated and represented to the defendant that he, defendant, would never be called upon to pay said money, or any part thereof, but that defendant's signature was to be used solely for the accommodation of the plaintiff; that plaintiff at said time was friendly and intimate with the defendant, and that, induced by such statements and representations, and believing the same to be true, the defendant signed said instrument and delivered the same to the plaintiff; that there was and is not any other consideration therefor.

§ 594. —— Limitations—Form

The statute of limitations is an affirmative defense, that must be pleaded by the party asserting or claiming it.[83]

Where defendant pleads only the statute of limitations of one state, he cannot rely upon or prove the statute of another state.[84] To avail himself of the statute of limitations he must show when the action was commenced.[85]

Where the action is barred by limitations, but the allegations of the petition are too broad to be met by demurrer, the defendant

[83] Torrey v. Campbell (Okl.) 175 P. 524.

Where the pleadings on their face do not show that the cause is barred by limitations, the statute is not available as a defense unless specially pleaded. Betz v. Wilson, 87 P. 844, 17 Okl. 383.

Where defendant answers by general denial, and does not demur at any stage of the proceedings, the defense of limitations cannot be raised in an action for breach of a covenant of warranty. Buchner v. Baker (Okl.) 164 P. 659.

Where it did not appear on the face of the petition that the cause of action was barred, and the statute was not pleaded, and the question whether the cause of action was barred was not otherwise raised, the defense of the statute was waived. Baker v. Sears, 42 P. 501, 2 Kan. App. 617.

The statute of limitations, if relied on as a defense, must be pleaded, unless the complaint shows affirmatively that plaintiff's action is barred. Chellis v. Coble, 15 P. 505, 37 Kan. 558; Mitchell v. Ripley, 49 P. 153, 5 Kan. App. 818.

The bar of the statute of limitations is a matter of defense, and, unless claimed, is waived. Reaves v. Turner, 94 P. 543, 20 Okl. 492; St. Louis & S. F. R. Co. v. Bloom, 39 Okl. 78, 134 P. 432; Croan v. Baden, 85 P. 532, 73 Kan. 364.

[84] Hays Land & Investment Co. v. Bassett, 116 P. 475, 85 Kan. 48.

[85] Pracht v. McNee, 18 P. 925, 40 Kan. 1.

may enter a general denial and await a failure of proof, so that the pertinency of the statute becomes apparent, and may then interpose a demurrer to the evidence.[86]

In an action on an open account, defendant must allege that he has been present in person within the state three years since the date of the last item in such account before the commencement of the action.[87]

An answer, in a suit to recover land, averring that the plaintiff's cause of action, if he had any, had not accrued within 15 years, is a sufficient plea of limitations.[88]

Where plaintiff, to remove the bar of limitations, pleads a payment, a general denial puts the burden on him, and defendant need not specially plead the bar of the statute.[89]

LIMITATION AS AN AFFIRMATIVE DEFENSE IN ANSWER

For further answer and defense to the petition of plaintiff here, defendant states that the alleged cause of action therein stated did not accrue within ——— years next before the commencement of this action, and that the same is barred by the statute of limitations of this state, to wit, by (citing section of statute).

§ 595. Pleading defenses in action on note

In an action on a note, the burden is upon defendant, admitting execution and delivery of the note, to plead affirmative matter by way of defense;[90] but where the petition or plaintiff's proof shows illegal consideration, it is available without pleading it.[91]

Failure of consideration for the note in suit is good defense as between original or immediate parties.[92]

[86] Arnold v. Barner, 163 P. 805, 100 Kan. 36.

[87] Conlon v. Lanphear, 15 P. 600, 37 Kan. 431.

[88] Anderson v. Canter, 63 P. 285, 10 Kan. App. 167.

[89] Good v. Ehrlick, 72 P. 545, 67 Kan. 94.

Where the complaint in an action brought in 1887 on a note given in 1861 alleges a payment thereon in 1883, a denial under oath of such payment is sufficient to present the issue of the statute of limitations; the note being barred upon its face unless such payment is proved. Lemon v. Dryden, 23 P. 641, 43 Kan. 477.

[90] Maston v. Glen Lumber Co. (Okl.) 163 P. 128.

[91] Chandler v. Lack (Okl.) 170 P. 516.

[92] Zebold v. Hurst (Okl.) 166 P. 99, L. R. A. 1917F, 579.

Partial failure of consideration is a good defense pro tanto to an action on a note, except as against an innocent holder in due course.[93]

An answer pleading usury, no consideration, agency between present payee and cashier of former payee, and present payee's knowledge of usury, was good, and the striking of such answer was error.[94]

An answer averring generally, without stating further facts, that note is without consideration, is good against demurrer;[95] but it is not error to sustain the demurrer to an answer in an action on a note which alleges want of consideration and pleads the specific facts from which such conclusion is deduced, when the facts alleged do not support the conclusion.[96]

A paragraph of the answer stating that "the defendant denies that he is indebted to plaintiffs in any sum whatever" states no defense.[97]

[93] Deming Inv. Co. v. Shannon, 62 Okl. 277, 162 P. 471.

The maker may plead that amount of note was greater than balance for which the note was given, and that to extent of excess note is without consideration. Holland Banking Co. v. Dicks (Okl.) 170 P. 253.

In action on collateral note indorsed to seller of threshing machine, defendant's claim that buyer had agreed to thresh his crop, and was attempting to do so when machine, which was of inferior quality, broke down and caused damages to him in excess of note, constituted no defense, as if machine was not as represented, or if seller breached warranty, buyer could alone complain. M. Rumley Co. v. Koetter (Okl.) 178 P. 116. In action on collateral note indorsed to seller of threshing machine, defendant's claim that buyer had agreed to thresh his crop and was attempting to do so when machine, which was of inferior quality, broke down and caused damages to him in excess of note, was no defense, as, if buyer damaged defendant in performance of contract, his remedy was against buyer. Id. In action on collateral note indorsed to seller of threshing machine, defendant's claim that buyer had agreed to thresh his crop and was attempting to do so when machine, which was of inferior quality, broke down and caused damages to him in excess of note, was no defense, as there was no privity between defendant and seller regarding buyer's breach of oral contract to thresh wheat. Id.

The maker of a note is entitled to make the same defenses against it in the hands of one not a holder in due course that he would be entitled to make if it were in the hands of the original payee. Douglass v. Brown, 56 Okl. 6, 155 P. 887.

[94] Callaham v. Thurmond (Okl.) 172 P. 798.

[95] Zebold v. Hurst (Okl.) 166 P. 99, L. R. A. 1917F, 579.

[96] Metz v. Winne, 79 P. 223, 15 Okl. 1.

[97] Spencer v. Turney, 49 P. 1012, 5 Okl. 683.

An answer admitting the execution, but denying that the plaintiff is the owner of the note, and that it has been transferred before maturity, without notice, and alleging that the note is void for fraud and deceit on the part of the original payee in obtaining the execution of the same, states a good defense.[98]

A plea of nonperformance of a condition precedent as a bar to a recovery on a note which on its face shows no privity, but which avers that the contract was made by one of the parties thereto as the special agent of defendant for the purpose of making the contract, is good as showing such privity in defendant as will enable him to take advantage of its terms.[99]

The answer, in an action on a purchase-money note, was not demurrable, where it alleged that the property was unsound, and that the buyer's admission of soundness and of release from warranty was the result of mutual mistake.[1]

A note founded on a consideration against public policy will not be enforced, even though the defense is not pleaded.[2]

Where the answer in an action on purchase-money notes sets up failure of title, it must contain an offer to reconvey.[3]

Where, on execution of a note payable to a person named, or his order, the maker fails to pay it, and the payee files a petition reciting the execution of a note for a valuable consideration and the default of defendant, ownership is presumed in the plaintiff, and it is not absolutely necessary for him to allege that he is still the owner and holder of such note, and an answer denying that he is the owner and holder states no defense, so that plaintiff is entitled to judgment on the pleadings.[4]

In the absence of any allegation that the signer of a note is unable to read, an answer admitting the execution of a note sued on, but alleging that the person procuring the note misrepresented its con-

[98] Edwards v. Miller, 30 Okl. 442, 120 P. 996.

[99] Cooper v. Ft. Smith & W. R. Co., 99 P. 785, 23 Okl. 139.

[1] McDonald v. McKinney Nursery Co., 44 Okl. 62, 143 P. 191.

[2] McGuffin v. Coyle & Guss, 85 P. 954, 16 Okl. 648, 6 L. R. A. (N. S.) 524; Id., 16 Okl. 648, 86 P. 962, 6 L. R. A. (N. S.) 524.

[3] Herron v. Haurbour, 57 Okl. 71, 155 P. 506; Rev. Laws 1910, § 986. Where the defense in an action for price is failure of warranty an offer to restore the goods should be alleged in the answer. Barber Medicine Co. v. Bradley, 48 Okl. 82, 150 P. 127.

[4] Berry v. Barton, 71 P. 1074, 12 Okl. 221, 66 L. R. A. 513.

ditions and defendant's liability, does not constitute a defense, where the note is unambiguous in its terms.[5]

§ 596. Pleading attachment or garnishment

In pleading a pending attachment or garnishment as a defense, the defendant should show what portion of the debt has been attached or garnished.[6]

§ 597. Defenses in replevin

In action for possession of a note or for its value in the alternative, an answer, pleading that since commencement of suit the note had been delivered by defendant and accepted by plaintiff, set up a valid defense, and a demurrer thereto was properly overruled.[7]

§ 598. Adverse possession

Where the entry of defendant on land is permissive and in privity with the owner's title, to show adverse possession he must plead such specific acts of disloyalty to the title or acts of dominion giving adverse character to his possession as will preclude all want of knowledge on the part of the owner.[8]

§ 599. Inconsistent defenses

A defendant may set out in his answer inconsistent defenses;[9] but where the answer sets up repugnant or inconsistent defenses, a denial of a fact alleged in the complaint in one part of the answer is modified by an admission thereof in another part of the answer, and such admission will be taken as true.[10]

However, an admission in an adversary's pleading, to be avail-

[5] Guthrie & W. R. Co. v. Rhodes, 91 P. 1119, 19 Okl. 21, 21 L. R. A. (N. S.) 490.

[6] Clark v. Marbourg, 6 P. 548, 33 Kan. 471.

[7] Harn v. Security Nat. Bank of Oklahoma City (Okl.) 177 P. 598.

[8] Acton v. Culbertson, 38 Okl. 280, 132 P. 812.

[9] Bilby v. Owen (Okl.) 181 P. 724; Metcalf v. Glaze (Okl.) 173 P. 446; Emerson-Brantingham Implement Co. v. Ware (Okl.) 174 P. 1066.

Where defendant claims title by purchase and also claims right to possession from having paid incumbrances placed on the property by plaintiff, the defenses are not inconsistent. New v. Smith, 145 P. 880, 94 Kan. 6, L. R. A. 1915F, 771, Ann. Cas. 1917B, 362.

[10] Conwill v. Eldridge (Okl.) 177 P. 79.

A defendant, sued on a contract to accept and pay for a life insurance policy, by defending on the ground that plaintiffs had broken their promise to pay for him a loan commission less in amount than the premium, held not to

able, must be taken with all the qualifying clauses included in it;[11] and where facts are alleged in a pleading in connection with an admission which nullifies it, the effect as an admission is destroyed.[12]

In action for damages from obstruction to channel of water course, defendant may deny the existence of the channel and plead that he had placed an embankment on his own land, and not in the channel, and had acquired the right to maintain it by prescription.[13]

In action for cancellation of deed, the sole defense of a purchase for a valuable and paid consideration excludes a defense that the lands in question passed by gift.[14]

§ 600. Negative pregnant

In a suit on a note wherein plaintiffs alleged the execution and delivery of the note, a paragraph of the answer alleging that defendant did not execute and deliver it is a negative pregnant, which admits the execution of the note.[15]

§ 601. Defense in libel and slander

In actions of libel or slander "the defendant may allege the truth of the matter charged as defamatory, and may prove the same, and any mitigating circumstances, to reduce the amount of damages, or he may prove either." [16]

have admitted a liability for the difference. Woodell v. Gibson, 140 P. 107, 92 Kan. 118.

In an action to quiet title, a special answer, alleging that, when plaintiff purchased the outstanding adverse title, he did it as the agent of defendant, and that defendant was entitled to have the court decree him to be the legal owner, modified the general denial so as to admit without further proof that plaintiff held the legal title when the action was commenced. Elliott v. Hudson, 113 P. 307, 84 Kan. 7.

Estoppel.—In an action to recover money paid on the price of land for failure of defendant to comply with a contract, where defendant alleges full compliance and asks for specific performance, a judgment for the balance of the price, and offers proof of execution by himself and wife of the deed conveying the land, he is estopped to claim in the same action that the contract for the sale of land is void on the ground that it comprises a homestead and that the wife failed to join in the contract. McNutt v. Nellans, 108 P. 834, 82 Kan. 424.

[11] Oklahoma Moline Plow Co. v. Smith, 139 P. 285, 41 Okl. 498.

[12] Id.

[13] Metcalf v. Glaze (Okl.) 173 P. 446.

[14] Marshall v. Grayson, 62 Okl. 45, 166 P. 86.

[15] Spencer v. Turney, 49 P. 1012, 5 Okl. 683.

[16] Rev. Laws 1910, § 4777.

A plea of justification must justify the sting of the very charge alleged.[17]

Defendant may set up as a defense both a general denial and that the defamatory language used by him is true.[18]

Where defendant's answer admits the publication and pleads the truth, it also admits use of the words with the meaning assigned to them in the petition.[19]

ANSWER IN LIBEL OR SLANDER SUIT

(Caption.)

Comes now the said defendant, and for his answer to the plaintiff's petition filed herein alleges and states:

1. That he denies each and every allegation of fact therein contained.

2. That he specifically denies that on or about the ——— day of ———, 19—, or at any other time, he spoke or published the words as alleged in plaintiff's petition, or that he at any time spoke or published any false or defamatory words with intent to injure the plaintiff.

3. That the said supposed false and defamatory words, as alleged in plaintiff's petition, are true.

4. And for a partial defense, and by way of mitigation of damages, the defendant alleges that the plaintiff had been, prior to the time alleged in the petition, employed by defendant, and one A. B., being desirous of employing the plaintiff, inquired of the defendant as to the character of the plaintiff, and the defendant then stated to him the following matters and things: (Setting forth statements made;) that the defendant had reasonable cause to believe, and did believe, that said statements were true, and did not in any other way publish the same; that said statements were made by defendant without malice on his part.

(Conclusion.)

[17] Vorhees v. Toney, 122 P. 552, 32 Okl. 570.

For a plea of justification to be a defense to libel it must possess great certainty of averment and must justify the sting of the very charge alleged, and it is not permissible to set up a charge of the same general nature but distinct as to the particular subject. Bodine v. Times-Journal Pub. Co., 110 P. 1096, 26 Okl. 135, 31 L. R. A. (N. S.) 147.

[18] Wallace v. Kopenbrink, 31 Okl. 26, 119 P. 579; Vorhees v. Toney, 122 P. 552, 32 Okl. 570.

[19] Spencer v. Minnick, 139 P. 103, 41 Okl. 613.

§ 602. Supplemental answer

On proper showing, leave should be granted to file a supplemental answer on such terms as may be just.[20]

SUPPLEMENTAL ANSWER

(Caption.)

Comes now the said defendant, C. D., leave of court having first been obtained, and files this his supplemental answer to plaintiff's petition herein, and alleges and states:

That since the filing of the defendant's answer herein, the following facts, material to this action and in further defense to said petition, have arisen: (Setting forth additional facts which it is desired to plead.)

(Conclusion.)

Division II.—General Denial

§ 603. Effect and sufficiency

A general denial is equivalent to a plea of nul tiel record at common law.[21]

An answer, which denies each and every allegation of the petition of plaintiff, is sufficient as a general denial,[22] and is the usual form; but an answer in which defendant "denies each and every allegation in the second amended petition herein that is prejudicial to defendant" has been held sufficient.[23]

A general denial raises the question of the statute of frauds.[24]

[20] In ejectment, defendant, to support the title and possession claimed by him, asked leave to file a supplemental answer setting up a title acquired subsequent to the action, and offered in evidence proofs of such title. Held, that permission to file a supplemental answer should have been granted on terms. Peterson v. Albach, 32 P. 917, 51 Kan. 150.

[21] Oliver v. Gimbel, 38 Okl. 50, 132 P. 144.

For form of general denial, see post, § 615.

[22] Nix v. Gilmer, 50 P. 131, 5 Okl. 740.

[23] Prunty v. Consolidated Fuel & Light Co., 108 P. 802, 82 Kan. 541.

[24] Render v. Lillard, 61 Okl. 206, 160 P. 705, L. R. A. 1917B, 1061.

A general denial has been held sufficient to raise the issue of the invalidity of a contract under the statute of frauds. Altoona Portland Cement Co. v. Burbank, 44 Okl. 75, 143 P. 845.

Where a party pleads an exception to toll the statutes, a general denial puts him on proof of such allegation. Theis v. Board of County Com'rs of Beaver County, 97 P. 973, 22 Okl. 333.

In an action for conversion, a general denial puts in issue the ownership of the property.[25]

§ 604. Disclaimer—Form

An unqualified general denial by defendants, who are strangers to the mortgage, will ordinarily, in the absence of other defenses be construed as a disclaimer.[26] A general denial followed by pleas of res judicata held not a disclaimer, where the petition did not demand of such defendants a foreclosure of other interests, but alleged that they subsequently acquired an inferior interest.[27] An answer will not be construed as a disclaimer of interest in mortgaged property, unless it shows an unequivocal intent to disclaim.[28]

DISCLAIMER

Comes now the defendant, F. S., and hereby disclaims any right, title, interest, or estate in the real estate set out in plaintiff's petition under and by virtue of a deed or contract made by the plaintiffs to the said J. D.

Wherefore, this defendant prays that he may go hence without day and recover his costs herein expended.

O. B. & M.,
Attorneys for Defendant, F. S.

§ 605. Must be entered for whom

"The guardian of an infant or person of unsound mind, or attorney for a person in prison, shall deny, in the answer, all the material allegations of the petition prejudicial to such defendant." [29]

§ 606. Effect—By guardian ad litem

A general denial, filed by the guardian ad litem of a minor, puts in issue every allegation of a petition, including allegations of the execution of written instruments and other allegations which an adult must deny under oath.[30]

[25] Hopkins v. Dipert, 69 P. 883, 11 Okl. 630; Robinson v. Peru Plow & Wheel Co., 31 P. 998, 1 Okl. 140.
[26] De Watteville v. Sims, 44 Okl. 708, 146 P. 224.
[27] Id.
[28] Id.
[29] Rev. Laws 1910, § 4752.
[30] Sims v. Hedges, 123 P. 155, 32 Okl. 683; Rev. Laws 1910, §§ 4752, 4760.

A guardian ad litem of an infant defendant should urge every defense available under the law.[31]

Division III.—Verified Denial

§ 607. Verification in general

"In all actions, allegations of the execution of written instruments and endorsements thereon, of the existence of a corporation or partnership, or of any appointment of authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." [32]

"The verification mentioned in the last section shall not be required to the answer of a guardian defending for an infant or person of unsound mind, or a person imprisoned." [33]

It is within the discretion of the court to permit pleadings to be verified at the commencement of, or during the trial.[34]

[31] Iowa Land & Trust Co. v. Dawson, 134 P. 39, 37 Okl. 593.

No presumption can be permitted against infant, but every presumption must be indulged in his favor, and guardian ad litem or other representative of infant must urge every question available in infant's behalf and on his failure to do so court must see that his rights are protected. In re Sanders' Estate (Okl.) 168 P. 197.

[32] Rev. Laws 1910, § 4759.

Under the Kansas Code, providing that in cases of transfer or interest the action may be prosecuted in the name of the original party, an averment in the answer that plaintiff had conveyed his interest in the land since the commencement of the action, which was not denied under oath was not sufficient to bar a recovery by the plaintiff. Douglas v. Muse, 61 P. 413, 62 Kan. 865.

[33] Rev. Laws 1910, § 4760.

Rev. Laws 1910, § 4760, expressly exempts the guardian of an infant or person of unsound mind from the requirements of section 4759, declaring that allegations as to the execution of a written instrument and indorsements duly verified shall be taken as true, unless the denial thereof is verified in like manner. Kaufman v. Boismier, 105 P. 326, 25 Okl. 252.

Where an answer is filed jointly by the administrator and the guardian of certain minors denying the execution of the instrument sued on, the verification of the administrator's answer verifying his belief that the facts therein stated are true, as authorized by Rev. Laws 1910, § 4762, is sufficient; the administrator not being required to verify the answer in the form required by section 4765. Kaufman v. Boismier, 105 P. 326, 25 Okl. 252.

[34] Permission to defendant at opening of trial to verify a general denial, previously verified by his counsel, was not an abuse of discretion. State Bank of Downs v. Abbott, 104 Kan. 344, 179 P. 326.

Where a verification of plaintiff's reply did not affect or change issues, de-

§ 608. Who may verify

"If there be several persons united in interest and pleading together, the affidavit may be made by any one of such parties. When a municipal or other corporation is a party, the verification may be made by an officer thereof, its agent or attorney." [35]

"In all cases where the party pleading is a nonresident of the county in which the action is brought, or if he shall be absent from the county in which the pleading is filed, an affidavit, made before filing the pleading, stating the substance of the facts afterwards inserted in the pleading, shall be a sufficient verification. Such affidavit shall be filed with the pleading intended to be verified thereby." [36]

"Where the affidavit is made by the agent or attorney, it must set forth the reason why it is not made by the party himself. It can be made by the agent or attorney only:

"First. When the facts are within the personal knowledge of the agent or attorney.

"Second. When the plaintiff is an infant or of unsound mind or imprisoned.

"Third. When the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney.

fendant was not prejudiced by court's permission that reply be verified during the trial. Kuykendall v. Lambert (Okl.) 173 P. 657.

Where an action is on a written contract not in the possession of plaintiff, and the substance only is set up in the petition, and defendant by an unverified answer dtnies the averments of the petition, and the case is tried on the theory that the terms of the contract are in issue, and afterwards, on a second trial, where plaintiff himself attaches a copy of the contract which was, in fact, executed, to his deposition, and swears that his action is founded on such contract, it is an abuse of discretion for the court to refuse to permit defendant to verify its answer, and to exclude proof of the contract in fact made, and of facts tending to defeat plaintiff's cause of action under it. National Mortgage & Debenture Co. v. Lash, 55 P. 846, 60 Kan. 141.

[35] Rev. Laws 1910, § 4761.

[36] Rev. Laws 1910, § 4763.

Gen. St. c. 95, § 112, provides that an affidavit verifying a pleading shall be filed with the pleading intended to be verified thereby. Held, that an affidavit which was filed December 21, 1893, in support of a motion to dissolve an attachment, cannot be considered as verifying an answer filed in the attachment proceedings on January 6, 1894. Johnson v. Woodbury Trust Co., 64 P. 1030, 63 Kan. 880.

"Fourth. When the party is not a resident of, or is absent from the county." [37]

Under the statute providing four different grounds upon which the required affidavit of denial can be made by the attorney or agent, any one of the grounds is sufficient to authorize the attorney to make the affidavit.[38]

The verification must set forth why it was not made by the party by showing some of the grounds specified in such section; [39] and

[37] Rev. Laws 1910, § 4765.

Where allegations of a petition set up authority of an agent, a plea denying this authority, when verified by affidavit of an agent or attorney, must, under Rev. Laws 1910, § 4765, set forth the reasons why it is not made by the party, and, when it does not bring the plea within any of the grounds therein provided, it is insufficient to raise the authority of the agent. Chicago, R. I. & P. Ry. Co. v. Mitchell, 101 P. 850, 19 Okl. 579. The word "party," as used in Rev. Laws 1910, § 4765, providing when affidavit is made by agent or attorney it must set forth why it is not made by the party himself, means party to the suit, whether a natural person or a corporation. Id.

Rev. Laws 1910, § 4759, provides that the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true, unless the denial of the same shall be verified by the affidavit of the party, his agent or attorney; and section 4765 provides that, when made by the agent or attorney, it must set forth the reasons why it is not made by the party himself. Held, that an affidavit denying the correctness of an account, when made by an attorney, without setting forth the reasons why it is not made by the party himself, is insufficient to question the correctness of the account. Board of Com'rs of Garfield County v. Isenberg, 61 P. 1067, 10 Okl. 378.

Where defendant does not put in issue an allegation of the petition that defendant is a foreign corporation, a subsequent affidavit attached to the answer and sworn to by an attorney is not insufficient for failure to comply with Rev. Laws 1910, § 4765, by showing that defendant is a foreign corporation. St. Paul Fire & Marine Ins. Co., of St. Paul, Minn., v. Earl, 54 Okl. 305, 153 P. 867.

A verification by an attorney, which states "that he is familiar with all the facts set out in the * * * answer, and knows the contents thereof," and that said answer, and all the facts and allegations contained therein, are true and correct, according to his belief, is a sufficient verification, under Code Civ. Proc. § 114, providing that a verification can be made by an attorney, inter alia, when the facts are within his personal knowledge. Johnson v. Woodbury Trust Co., 57 P. 134, 8 Kan. App. 860.

[38] Gibson v. Shorb, 52 P. 579, 7 Kan. App. 732.

[39] Aldred v. Ray, 54 Okl. 154, 153 P. 664, 7 A. L. R. 1.

The plaintiff corporation sued as the assignee of a lease executed by defendant, and the answer consisted of a general denial and a special denial, and was verified by R. as attorney and agent of the defendant. R. alleged in his affidavit that he was familiar with all facts in the answer, and that it was true and correct, as he verily believed. Held, that neither the answer nor the affidavit showed a state of facts which, under the Code, authorized R. to

it should show that affiant has some personal knowledge of the facts stated in the pleading.[40]

An affidavit which states that the affiant is attorney for a defendant who is a nonresident or absent from the county, and that affiant is informed and believes that the allegations of the answer are true, is a sufficient verification.[41]

§ 609. How made—On belief

"The affidavit verifying pleadings may be made before any person before whom a deposition might be taken, and must be signed by the party making the same; and the officer before whom the same was taken shall certify that it was sworn to or affirmed before him, and signed in his presence. The certificate of such officer signed officially by him, shall be evidence that the affidavit was duly made, that the name of the officer was written by himself, and that he was such officer." [42]

In an action on a written obligation, the execution of which is put in issue by a verified denial, the burden of proof is on the plaintiff, and, in the absence of any proof thereof, a demurrer to his evidence should be sustained.[43]

Where a verified denial is filed, the execution of a written instrument must be proved before the instrument can be introduced in evidence.[44]

verify the answer as the agent or attorney of defendant. Johnson v. Woodbury Trust Co., 64 P. 1030, 63 Kan. 880.

40 Aiken v. Franz, 43 P. 306, 2 Kan. App. 75.

41 Gibson v. Shorb, 52 P. 579, 7 Kan. App. 732.

42 Rev. Laws 1910, § 4764.

43 Correll v. Morgan (Okl.) 174 P. 509.

44 Moore v. Leigh-Head & Co., 48 Okl. 228, 149 P. 1129.

Civ. Code Kan. § 108, provides that in all actions allegations of the execution of written instruments and indorsements thereon shall be taken as true unless the denial of the same be verified by affidavit. Held, in an action on a note, that since, on a verified general denial, it devolved on plaintiff to prove the execution of the instrument as alleged in the petition, defendant could show an alteration by the insertion of the figure 8 in the interest clause. J. I. Case Threshing Mach. Co. v. Peterson, 33 P. 470, 51 Kan. 713.

Where plaintiff in replevin, in his petition, claims a special ownership in the goods sued for by virtue of a chattel mortgage executed and delivered to him by other parties than defendant, and defendant pleads by general denial, under oath, an issue is formed as to the execution of the mortgage, and it is error to permit the mortgage to be introduced in evidence without proof of its execution. Lilly v. Russell & Co., 44 P. 212, 4 Okl. 94.

On a verified denial of the petition a sworn itemized statement on which plaintiff relies is inadmissible over objection.[45]

Where the defendant denies under oath the execution of a policy, the burden is on the plaintiff to make prima facie proof of execution thereof before introducing the policy in evidence.[46]

"The affidavit shall be sufficient if it state that the affiant believes the facts stated in the pleadings to be true." [47]

§ 610. Execution of written instruments—Indorsement

Where a petition alleges a written contract, a general denial, which is not verified, admits the written agreement and its purport as pleaded, as an allegation of the execution of a written instrument is to be taken as true, unless denied under oath.[48]

This rule applies to the denial of the execution of the instrument only, and not to a denial of the authority of the person by whom

[45] Walker v. West Pub. Co., 55 Okl. 221, 154 P. 1189.

[46] St. Paul Fire & Marine Ins. Co., of St. Paul, Minn., v. Earl, 54 Okl. 305, 153 P. 867.

[47] Rev. Laws 1910, § 4762.

Though a positive affidavit to the correctness of an account is necessary, in order that it may be regarded as duly verified, denial thereof is sufficient, if supported by the oath of the affiant that he believes it to be true. Orendorff v. Brown Bed Mfg. Co., 173 P. 281, 103 Kan. 183, Rev. Laws 1910, § 4762.

[48] Atchison, T. & S. F. R. Co. v. Bell, 34 P. 350, 52 Kan. 134; St. Louis & S. F. R. Co. v. Driggers (Okl.) 166 P. 703; City of Eufaula v. Oklahoma Corrugated Steel & Iron Co. (Okl.) 166 P. 881; Twist v. Colonial Trust Co., 53 Okl. 800, 158 P. 938; Ince Nursery Co. v. Sams (Okl.) 177 P. 370; Owen v. United States Surety Co., 38 Okl. 123, 131 P. 1091; Continental Ins. Co. v. Pratt, 55 P. 671, 8 Kan. App. 424.

Where an instrument not required by statute to be attached as an exhibit is attached to a petition, and its execution is alleged and its substance pleaded, its execution will be taken as admitted, if not denied under oath on trial. Long v. Shepard, 130 P. 131, 35 Okl. 489.

In an action on a note by the assignee under a written indorsement executed before maturity and indorsed on the note, where a copy of the note and indorsement thereon is attached to the petition as an exhibit, and the original note and indorsement is introduced in evidence and the answer is not verified by defendant's affidavit, the execution of the note and the indorsement is admitted. Commonwealth Nat. Bank of Dallas, Tex., v. Baughman, 111 P. 332, 27 Okl. 175.

In an action on written contracts binding defendant, among other things, to make an unconditional payment of money, an unverified answer leaves defendant practically in default. Read v. Dodsworth, 147 P. 799, 95 Kan. 117.

Under Code Civ. Proc. § 110 (Gen. St. 1909, § 5703), the omission to verify the denial of a statement in a petition that owner of mortgaged realty had conveyed it to defendant by deed whereby grantee assumed incumbrance was

it was executed.[49] It has been held that, where the execution of a chattel mortgage is properly alleged in a petition, and is not denied under oath, it is not material error for the court to admit a copy thereof in evidence, though it may not be duly authenticated.[50]

The statute providing that allegations of the execution of written instruments shall be taken as true unless there is a verified denial does not preclude defendant from pleading in an unverified answer and proving that he signed the contract, but that his signature was procured by the fraud of plaintiff;[51] nor that the mortgage under which plaintiff claims is void, for the reason that one of the parties thereto was insane at the time it was executed,[52] nor does it preclude him from establishing that the chattel mortgage sued on was fully paid prior to the commencement of the action to replevin property therein named.[53]

It has been held that the validity of a tax deed, good upon its face, may be put in issue by an unverified pleading.[54] But where, in an action for a breach of warranty in a deed, the petition sets out that, at the date of such deed, there were outstanding valid tax certificates against the premises, that such certificates were duly assigned and taxes paid thereon, and tax deeds issued, and purchased by plaintiff, an unverified general denial does not put in issue the regularity of such tax proceedings, but admits it.[55]

When the allegations of the execution of a contract of agency are not denied, but the illegality of the contract is pleaded, a verification is unnecessary.[56]

equivalent to an admission that such deed was executed. McAndrew v. Sowell, 163 P. 653, 100 Kan. 47.

Verified answer held not to join issue of fact as to execution of note and mortgage, so that it was not error to admit them without first proving their execution. Garnett v. Storm, 64 Okl. 137, 166 P. 401; Pine v. Western Nat. Bank, 65 P. 690, 63 Kan. 462.

[49] Hilsmeyer v. Blake, 125 P. 1129, 34 Okl. 477; Flesher v. Callahan, 122 P. 489, 32 Okl. 283.

[50] Handley v. Harris, 29 P. 1145, 48 Kan. 606, 30 Am. St. Rep. 322, 17 L. R. A. 703.

[51] St. Louis Jewelry Co. v. Bennett, 90 P. 246, 75 Kan. 743.

[52] State Bank of St. John v. Norduff, 43 P. 312, 2 Kan. App. 55.

[53] Nutt v. Humphrey, 3 P. 787, 32 Kan. 100.

[54] Curtis v. Schmehr, 76 P. 434, 69 Kan. 124.

[55] Walker v. Fleming, 14 P. 470, 37 Kan. 171.

[56] Alexander v. Barker, 67 P. 829, 64 Kan. 396.

Where a petition sets forth a cause of action upon a verbal contract, and the answer denies the same, and properly alleges a written contract, and the

In an action to rescind a contract made under duress for the purchase of land and for cancellation of a note, the issue of duress and illegality of the note raised by the pleadings and established prima facie by plaintiff's evidence makes a judgment for defendant on his cross-petition improper, although plaintiff's answer thereto is not verified.[57]

Failure to deny the execution of an administrator's deed under oath does not admit the validity of the proceedings on which it is based.[58] An allegation that a party is the owner of real property under a valid and legal deed of conveyance duly executed describes no written instrument whose execution is to be held admitted unless denied under oath.[59]

When the answer alleges the execution of a written contract concerning the matters in difference between the parties, and no denial thereof is made under oath by plaintiff, the execution of such contract is admitted, together with all natural inferences to be made therefrom.[60]

Allegations as to the execution of written instruments and indorsements thereon are taken as true, unless the denial is verified by affidavit.[61] Unless the indorsements of written instruments are specifically alleged in the petition, issues may be raised thereon by an unverified denial.[62]

reply thereto is not verified, but contains an allegation that the execution of the written contract was procured by fraud and misrepresentation, an objection to the introduction of evidence, made by the defendant, is properly overruled, as an issue was raised by the reply. Missouri Pac. Ry. Co. v. McGrath, 44 P. 39, 3 Kan. App. 220.

[57] Bushey v. Coffman, 173 P. 341, 103 Kan. 209.

[58] O'Keefe v. Behrens, 85 P. 555, 73 Kan. 469, 8 L. R. A. (N. S.) 354, 9 Ann. Cas. 867.

[59] Id.

[60] Chicago, B. & Q. R. Co. v. Imhoff, 45 P. 627, 3 Kan. App. 765.

Where written document is pleaded as defense, unverified reply does not put in issue execution of such instrument, and there is no necessity for proving it on trial. St. Louis & S. F. R. Co. v. Driggers (Okl.) 166 P. 703.

Under Rev. Laws 1910, § 4759, allegations of the execution of a written release set up in the answer will be taken as true, unless denied by verified reply. St. Louis & S. F. R. Co. v. Bruner, 52 Okl. 349, 152 P. 1103.

[61] J. I. Case Threshing Mach. Co. v. Rennie (Okl.) 177 P. 548.

[62] Berry v. Oklahoma State Bank, 50 Okl. 484, 151 P. 210, L. R. A. 1916A, 731.

In an action on a guaranty of payment of a note and interest coupons by one other than the payee, where the petition alleged that the plaintiff was

Rev. Laws 1910, § 4759, requires a specific allegation, independent of exhibits, of the indorsements on written instruments, before defendant is required to deny same under oath.

An allegation of indorsement of bills of exchange is not put in issue by a verified allegation in the answer denying that the bills were transferred and indorsed to plaintiff for value before maturity.[63] There is no presumption of want of authority to indorse the name of a payee on a bill of acceptance, by means of a rubber stamp, where the indorsee suing thereon alleges due indorsement; such allegations being taken as true, unless a denial thereof is duly verified.[64]

§ 611. Appointment or authority

An allegation of an agency in a pleading must be taken as true unless denied under oath; but, if no objection is made to the introduction of evidence to prove or disprove agency, then this statutory requirement is waived, and in such a case it is the duty of the court to submit the issue of agency as though the pleading denying agency was verified;[65] and failure to deny under oath allegations of the appointment or authority of a public officer is an admission of the title of the officer to the office as alleged and of his power and authority to perform the duties and functions thereof.[66]

the owner and holder of the note and coupons, but did not allege the execution of a written indorsement of the same, an unverified general denial puts the ownership of the paper in issue. Southern Kansas Farm Loan & Trust Co. v. Barnes, 66 P. 638, 63 Kan. 548.

[63] Metropolitan Discount Co. v. Davis (Okl.) 170 P. 707, 7 A. L. R. 670.

[64] Metropolitan Discount Co. v. Davis (Okl.) 170 P. 707, 7 A. L. R. 670.

[65] Burford v. Hughes, 75 Okl. 150, 182 P. 689; Knudson v. Fenimore (Okl.) 169 P. 478, L. R. A. 1918C, 181; Ince Nursery Co. v. Sams (Okl.) 177 P. 370; Hughes v. Carlton, 48 P. 444, 5 Kan. App. 386; Arkansas City Bank v. McDowell, 52 P. 56, 7 Kan. App. 568; Terry v. Anderson, 51 P. 800, 6 Kan. App. 921; Ft. Smith & W. R. Co. v. Solsberger, 38 Okl. 40, 131 P. 1078; McCabe & Steen Const. Co. v. Wilson, 87 P. 320, 17 Okl. 355, judgment affirmed 28 S. Ct. 558, 209 U. S. 275, 52 L. Ed. 788.

A general allegation of agency, when not denied under oath, will be presumed without proof to be an agency with such authority as is charged in the pleading. Gaar, Scott & Co. v. Rogers, 46 Okl. 67, 148 P. 161.

[66] City of Ardmore v. Sayre, 54 Okl. 779, 154 P. 356.

Under Rev. Laws 1910, § 5427, an allegation of the bill of particulars that plaintiff was employed by the defendant city as "secretary to the mayor" will be taken as true when not denied by affidavit. Oklahoma City v. Saunders, 46 Okl. 1, 147 P. 1191.

Where a petition avers that plaintiff is the duly appointed, acting guardian of certain minors, an unverified answer admits such guardianship.[67]

In an action by a widow to recover for the death of her husband, who was a resident of the state, an allegation that no personal representative of his estate had been appointed is put in issue by the unverified denial, and without proof of such fact a demurrer to the evidence is rightfully sustained; such right to sue not being an "appointment," or an "authority." [68] But a failure to deny under oath an allegation of plaintiff that defendant, through an agent, did a certain act, is not admission that defendant did the act complained of.[69] Nor is an allegation in a pleading of the nonexistence of authority to be taken as true because the denial of the same is not verified.[70]

In an action against a corporation for personal injuries in being struck by defendant's automobile, allegations in the petition that the automobile was under the care of defendant's servant who controlled it, together with defendant's failure to verify the answer, would not constitute an admission of the truthfulness of the allegations of the petition.[71]

An allegation that one had full authority to act for himself is not to be taken as true when not denied under oath.[72]

An allegation that plaintiff is the holder of the note sued on may be put in issue by an unverified answer, where the note does not show plaintiff's ownership.[73]

[67] Kerr v. McKinney (Okl.) 170 P. 685; Tate v. Stone, 130 P. 296, 35 Okl. 369.

[68] Vaughn v. Kansas City N. W. R. Co., 70 P. 602, 65 Kan. 685.

[69] Leavenworth Light & Heating Co. v. Waller, 70 P. 365, 65 Kan. 514, reversing judgment Waller v. Leavenworth Light & Heating Co., 61 P. 327, 9 Kan. App. 301; Missouri Pac. Ry. Co. v. Finley, 16 P. 951, 38 Kan. 550; Swofford Bros. Dry Goods Co. v. Berkowitz, 51 P. 796, 7 Kan. App. 24.

[70] Winfield Land & Trust Co. v. Burger, 30 P. 476, 49 Kan. 233; Atchison, T. & S. F. R. Co. v. Walz, 19 P. 787, 40 Kan. 433.

[71] Oklahoma Automobile Co. v. Benner (Okl.) 174 P. 567.

A petition in action for injury by defendant's automobile driven by his daughter, alleging her general authority to use it for herself and friends, and that she was then acting under such authority held not to allege her agency, so as to require a denial under oath. Stafford v. Noble, 105 Kan. 219, 182 P. 650.

[72] Washbon v. State Bank of Holton, 121 P. 515, 86 Kan. 468.

[73] Shipman v. Porter, 48 Okl. 265, 149 P. 901, 902.

In action on note by one other than the payee, where nothing appears by in-

However, in the payee's action against the maker, an unverified answer admitting execution and delivery of the note sued on, but alleging that the payee is not the owner and holder thereof, states no defense.[74]

§ 612. Account

To relieve plaintiff from proving an open account as against a general denial, it is essential, not only that a properly verified copy of the account be attached to the petition, but that the petition allege its correctness.[75]

Failure to deny under oath a verified account admits only its accuracy, and not its legality.[76]

Defendant need not deny under oath an unintelligible verified statement of account.[77]

Where a plaintiff attaches a duly verified account to his petition, but does not specifically allege in the petition that the account is correct, the defendant is not required to deny the correctness of the account under oath, but may raise the issue by a general denial.[78] The statute requires, not only that a verified account be

dorsement, etc., to indicate the ownership of the note, an allegation that plaintiff is the owner and holder may be put in issue by an unverified answer. Southwest General Electric Co. v. Riddle (Okl.) 168 P. 436.

[74] Burling v. Stinnett, 46 Okl. 159, 148 P. 140.

[75] El Reno Vitrified Brick & Tile Co. v. C. W. Raymond Co., 46 Okl. 388, 148 P. 1000.

The petition must allege the correctness of the verified account attached. A verification of the petition which includes a statement of the account is not sufficient. Myers v. First Presbyterian Church of Perry, 69 P. 874, 11 Okl. 544.

Where there is no allegation in a pleading of the correctness of a verified account attached thereto, there can be no denial thereof, and the account is at issue under the general denial. Haldeman v. Johnson, 54 P. 507, 8 Kan. App. 473.

[76] Hill v. Board of Com'rs of Republic County, 160 P. 987, 99 Kan. 49.

Under Gen. St. 1889, par. 4191, which provides that "in all actions allegations of * * * the correctness of any account duly verified * * * shall be taken as true, unless the denial of the same be verified," etc., it is not necessary that an answer should be verified in order to raise the issue of the maturity of the account; and, where its correctness is not denied, evidence may be introduced to show it is not due, though the petition is verified, and the answer is not. Johnston v. Johnson, 44 Kan. 666, 24 P. 1098.

[77] Continental Gin Co. v. Sullivan, 48 Okl. 332, 150 P. 209.

[78] Miners' Supply Co. v. Chesnutt-Gibbons Grocer Co., 50 Okl. 151, 150 P. 686.

attached to a petition, but that the petition specifically allege its correctness before defendant is required to deny it under oath, otherwise a general denial is sufficient.[79]

An answer which does not question the correctness of a verified account as set forth in the petition, but which sets up an affirmative defense, need not be verified.[80]

§ 613. Corporation and partnership

"In all civil actions brought by or against a corporation, it shall not be necessary to prove on the trial of the cause the existence of such corporation, unless the defendant shall in his answer expressly aver under oath that the plaintiff or defendant is not a corporation." [81]

[79] Id.

The correctness of plaintiff's account is not admitted by defendant's failure to deny it under oath when the petition contains no allegation of its correctness, though a verified account is attached to the petition. Dewey v. Burton, 46 P. 321, 4 Kan. App. 582.

Under Wilson's Rev. & Ann. St. 1903, § 4312, providing that, where the correctness of accounts is duly verified, it shall be taken as true unless the denial is verified, where the verification of an account contains no allegation of its correctness, it does not require the answer to be verified. Sawyer & Austin Lumber Co. v. Champlain Lumber Co., 84 P. 1093, 16 Okl. 90.

Under Civ. Code, § 108, providing that the correctness of an account verified by affidavit of the party or his attorney shall be taken as true, unless the denial of the same be verified in a similar manner, the correctness of an account set up by defendant as a counterclaim is not admitted by the failure of plaintiff to deny the same under oath, when the correctness thereof is not alleged in the answer. McMath v. Beal, 45 P. 1103, 4 Kan. App. 565.

A verified counterclaim by defendant in trespass alleged that defendant was to have one-half the crops raised by plaintiff on the premises, and that plaintiff converted the whole of such crops to his own use. The amount of the crops which defendant would have received was itemized. Held, that the counterclaim was not a statement of account, to be taken as true unless the denial thereof was verified. Kauter v. Fritz, 47 P. 187, 5 Kan. App. 756.

[80] Sawyer & Austin Lumber Co. v. Champlain Lumber Co., 16 Okl. 90, 84 P. 1093.

The fact that a verified account sued on is not denied by a verified affidavit does not preclude defendant from interposing any defense pleaded which does not involve a denial of the reasonableness of the amounts charged or the correctness of the items; but defendant may show that plaintiff agreed to charge nothing for the work, or that the account was paid. Lucas v. Board of Com'rs of Ford County, 73 P. 56, 67 Kan. 418.

[81] Rev. Laws 1910, § 1250.

Unless it is alleged in the answer under oath that plaintiff is not a corporation, plaintiff need not prove that it is a corporation. Marshall Mfg. Co. v.

"Whenever any suit shall be instituted by an incorporated town it shall not be required to show its compliance with any of the provisions of law as to its organization or publication of by-laws or ordinances, unless the same is controverted by affidavit." [82]

Where the petition alleges that a third person was the agent of defendant, and such allegation is not denied, it will be treated as admitted.[83]

Where petition alleges sale of goods to defendants as partners, one defendant's denial under oath that she owed plaintiff anything, and of existence of partnership, admits correctness of account, but not her indebtedness thereon, and, to recover, plaintiff will be required to show either a personal or partnership liability.[84]

An unverified denial of an allegation of existence of a partnership is ineffectual, and presents no defense to an action against such partnership.[85]

§ 614. Waiver

The provision that allegation of indorsement on written instruments, not met by a verified denial, shall be taken as true, may be waived by the pleader's introducing evidence thereon.[86]

§ 615. Forms

GENERAL DENIAL—VERIFIED DENIAL OF NOTE SUED ON

(Caption.)

Comes now the said defendant, G. H. & Co., a corporation, and files its answer to the petition of plaintiffs filed herein, and states:

1. The defendant, answering the first alleged cause of action set forth in the petition herein, denies each and every allegation

Dickerson, 55 Okl. 188, 155 P. 224; First Nat. Bank of Tishomingo v. Latham, 132 P. 891, 37 Okl. 286.

[82] Rev. Laws 1910, § 676.

[83] J. I. Case Threshing Mach. Co. v. Mosley (Okl.) 173 P. 208.

[84] Watson-Durand-Kasper Grocery Co. v. Scheetz, 163 P. 168, 99 Kan. 772.

[85] Miles v. Grosman Co. (Okl.) 173 P. 808.

[86] Spaulding v. Thompson, 60 Okl. 136, 159 P. 509.

Verification of the answer in an action on a written instrument is waived, notwithstanding Code Civ. Proc. § 110 (Gen. St. 1909, § 5703), where plaintiff joins issue, introduces evidence contradicting the defense, and asks instructions relative thereto. Emery v. Bennett, 155 P. 1075, 97 Kan. 490, Ann. Cas. 1918D, 437.

therein contained, except such as are hereinafter specifically admitted.

2. The said defendant admits that it is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Oklahoma.

3. The defendant, answering the second alleged cause of action set forth in the petition herein, denies each and every allegation therein contained, except such as are hereinbefore specifically admitted.

4. Further answering the second alleged cause of action set forth in the petition herein, defendant specifically denies that it made, executed, or delivered the promissory note and mortgage alleged in said second alleged cause of action, or that the authorized agent of defendant made, executed and delivered the same.

(Signature) Attorney for Defendant.

State of Oklahoma, }
County of ———. } ss.:

X. Y., being first duly sworn, says: That he is an officer, to wit, the president, of the defendant corporation; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge.

(Signature.)

Subscribed and sworn to before me this ——— day of ———, 19—.

(Seal.) (Signature) Notary Public.

My commission expires ———, 19—.

VERIFIED DENIAL OF THE CORRECTNESS OF THE ACCOUNT SUED ON

(Caption.)

Comes now the said defendant, E. F., and for his answer to the petition of plaintiff filed herein denies each and every allegation therein contained, and specifically denies the correctness of the verified account sued on.

(Signature) Attorney for Defendant.

State of Oklahoma, }
County of ———. } ss.:

———, being first duly sworn, states: That he is the defendant (or attorney or agent for the defendant) in the above entitled ac-

tion, and that the above and foregoing statements in denial are true. (Signature.)

Subscribed and sworn to before me this ——— day of ———, 19—.

(Seal.) (Signature) Notary Public.

My commission expires ———, 19—.

Division IV.—Counterclaim and Set-Off

§ 616. Counterclaim—Nature—Right to interpose—Set-off—Limitations

"The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim or connected with the subject of the action or on account of a wrongful attachment or garnishment issued and levied in said action after the same has been set aside. The right to relief concerning the subject of the action mentioned in the same section must be a right to relief necessarily or properly involved in the action for a complete determination thereof, or settlement of the question involved therein. Provided, that either party can plead and prove a set-off or counterclaim of the proper nature, in defense of the liability sought to be enforced by the other party, and it shall not be necessary that such set-off shall exist as between all parties plaintiff and defendant in such suit, but any party may enforce his set-off or counterclaim against the liability sought to be enforced against him. Such set-off or counterclaim shall not be barred by the statutes of limitations until the claim of the plaintiff is so barred." [87]

§ 617. Set-off—Right to interpose

"A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract or ascertained by the decision of a court." [88]

[87] Rev. Laws 1910, § 4746.

[88] Rev. Laws 1910, § 4747.

Contract and tort.—In an action on a contract defendant may set off or plead as a defense thereto any claim arising to him by virtue of any contract with plaintiff. Mowatt v. Shidler (Okl.) 168 P. 1169. In suit for price of

While the principal debtor may set off a debt due from the maker to him in an action against him and his surety jointly, his surety cannot do so on his own motion, unless he shows the insolvency of

land and to establish a vendor's lien, where defendant pleaded as a set-off an indebtedness from plaintiff, evidenced by a note and account, instruction that he could not set it off unless there was an agreement that debt should be set off as part of consideration for property, held error. Id.

In an action on a note given for the price of machinery, where the property was returned under the contract, defendant was entitled to a credit for the reasonable value of the property when it was returned to plaintiff. Wade v. Ray, 139 P. 116, 41 Okl. 641.

A claim on an implied contract is not allowable to defendant as a set-off in an action sounding in tort. Nation v. Planters' & Mechanics' Bank, 119 P. 977, 29 Okl. 819.

Where plaintiff states such facts as are necessary to sustain an action to recover chattels on the implied contract, and none showing a purpose to rely on the tort, except in using the words, "did convert the same to her own use and benefit," and alleges that he is the owner, the character of ownership, the taking of the chattels for defendant's benefit, and their value, a demand for the value, a refusal, and a prayer for recovery of the alleged value, there being no specific allegation of fraud, wrong, or injury to plaintiff by reason of the tort, but the amount claimed being confined to the alleged value, defendant may treat the action as ex contractu, and where defendant pleads set-off, and plaintiff replies, evidence of set-off is properly admitted. Smith v. McCarthy, 18 P. 204, 39 Kan. 308.

A railroad company sued its former treasurer for moneys alleged to belong to the company, and to have been received by him as treasurer, and wrongfully appropriated by him to his own use. It appeared that he appropriated the same in payment of certain claims which he held against the company, the claims being founded on contract. Held, that he might set off such claims against the claim of the railroad company so far as they were legal and valid. St. Louis, Ft. S. & W. R. Co. v. Chenault, 12 P. 303, 36 Kan. 51.

Damages arising out of an actionable tort in a land trade cannot be set off or counterclaimed in an action on a contract which was distinct from the transaction in which the tort was committed. Hazlett v. Wilkin, 140 P. 410, 42 Okl. 20.

A cause of action accruing to defendant for damages resulting from a conspiracy between plaintiff and another to bring an unjustifiable suit against him, and the bringing of such suit in pursuance of the conspiracy, cannot be set up as a counterclaim in answer to plaintiff's demand, as it does not arise out of the contract which is the foundation of plaintiff's claim. First Nat. Bank v. Hasie, 48 P. 22, 57 Kan. 754.

——*Waiver of tort.*—In an action on a note by the payee, the maker, who alleges that his employé owns the real interest in the note, may set off a claim against such employé for goods embezzled by the latter, such claim being one on implied contract, since the employer could waive the tort and sue the agent on contract. Challiss v. Wylie, 11 P. 438, 35 Kan. 506.

A railroad company sued its former treasurer for moneys alleged to belong to the company, and to have been received by him as treasurer, and wrong-

his principal and his inability to obtain relief either in an action against him or as a defense to an action on the note.[89]

§ 618. Defined and distinguished—Statute applied

A counterclaim is a cause of action existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim, or connected with the subject of the action.[90]

A set-off is a cause of action arising upon contract or ascertained by the decision of a court, and can only be pleaded in an action founded on contract. It must be independent of, and not connected with, the contract made the foundation of the cause of action in the petition, and can only be pleaded where there is mutuality of parties. The cause of action sought to be pleaded as a set-off must exist in favor of all the defendants against the plaintiff.[91]

fully appropriated by him fully delayed a train, for the purpose of injuring it, was founded on contract; nor could the company waive the torts for the purpose of recovering as for breach of contracts. Atchison, T. & S. F. R. Co. v. Phelps, 46 P. 183, 4 Kan. App. 139.

[89] Willoughby v. Ball, 90 P. 1017, 18 Okl. 535.

[90] Richardson v. Penny, 61 P. 584, 10 Okl. 32.

[91] Id.

Counterclaim.—A "counterclaim" is the claim of a defendant to recover from a plaintiff by setting up and establishing any cross-demand which may exist in his favor as against plaintiff. Drovers' State Bank v. Elliott, 154 P. 255, 97 Kan. 64.

Defendant may prove counterclaim arising out of contract or transaction alleged as foundation of claim, or connected with subject of action. Cooper v. Gibson (Okl.) 170 P. 220.

A counterclaim need not simply defeat plaintiff's recovery or reduce the amount thereof, but, is something of a legal or equitable nature arising out of the contracts or transactions set forth in the petition giving defendant a right to relief necessarily or properly involved in a complete determination of the action. Hodge v. Bishop, 151 P. 1105, 96 Kan. 419.

In an action on a contract, defendant may plead as a counterclaim any cause of action arising on contract which he may have against plaintiff. Orr v. Gerrold, 57 P. 48, 8 Kan. App. 441.

A counterclaim secures to defendant full relief, which a separate action at law or a bill in chancery or a cross-bill would have secured for him on an allegation and proof of the facts, but relates only to such causes of action as exist against plaintiff and which might be basis of an action against him by defendant. Mathews v. Sniggs, 75 Okl. 108, 182 P. 703.

It is not necessary that a counterclaim should be founded in or arise out of the contract set forth in the petition; it being sufficient if it arises out of

the transaction set forth in the petition, or is connected with the subject of the action. Wyman v. Herard, 59 P. 1009, 9 Okl. 35.

In an action for plastering a house, where defendant pleaded a counterclaim, alleging damages on account of plaintiff's unskillful workmanship in constructing a foundation for the house, it must be shown by defendant that the contract for building such foundation was a part of the same contract or transaction under which the plastering of the house was done. Allison v. Shinner, 54 P. 471, 7 Okl. 272.

The answer, in an action for rent, held to present a proper counterclaim, where it asked that defendant's wife be made a party and be adjudged to have an equitable title to the land, and that plaintiff be required to carry out the contract in which the title originated. Hodge v. Bishop, 151 P. 1105, 96 Kan. 419.

In action on building contract, defendant may elect to counterclaim against contractor for damages from failure to perform contract, instead of defending against any recovery because of such failure to perform. Brown v. Tull (Okl.) 164 P. 785.

A chattel mortgagor may counterclaim, in replevin to recover the goods under the mortgage securing the purchase price, for damages for fraud in the sale. Miller v. Thayer, 150 P. 537, 96 Kan. 278.

Where the answer of defendant in ejectment alleged that he had a lease for a term of years, and that plaintiff was in unlawful possession and unlawfully withholding the premises from defendant, and prayed judgment for possession and for damages, that part of the answer claiming interest in the land and asking affirmative relief was a counterclaim. Long v. Bagwell, 38 Okl. 312, 133 P. 50.

Where a plaintiff files a petition in ejectment, and defendant in his answer, in addition to a general denial, states he is in possession of the same land, and claims to be the owner thereof by virtue of a tax deed, and asks that his title thereto may be quieted against plaintiff, that part of his answer claiming title in himself, and asking affirmative relief, is a counterclaim, within Code, § 95, defining a counterclaim as a demand existing in favor of defendant and against plaintiff arising out of the transaction sued on. Venable v. Dutch, 15 P. 520, 37 Kan. 515, 1 Am. St. Rep. 260.

A mortgagor may, in replevin by the mortgagee, plead as a counterclaim the breach of a contract by the mortgagee to buy the goods and pay the difference between the amount of the mortgage and the agreed price of the goods. Deford v. Hutchison, 25 P. 641, 45 Kan. 318, 11 L. R. A. 257, judgment modified, 26 P. 60, 45 Kan. 332.

In an action to recover damages for the removal of a house from real estate upon which plaintiff claimed a mortgage, defendants answered by a general denial, and set up a counterclaim, alleging that they had been prevented from making a loan by reason of the bringing of such action, and had been thereby damaged. Plaintiff failed to reply or appear, and the court rendered judgment in favor of defendants upon such answer. Held error, as the answer did not set up facts sufficient to constitute a counterclaim, the facts having arisen, not from the same transaction involved in the action, but from the bringing of the action. Kansas Loan & Investment Co. v. Hutto, 29 P. 558, 48 Kan. 166.

In an action by a mortgagee against the mortgagor for possession of a traction engine and other chattels, the mortgagor cannot recover on a coun-

§ 619. Subsisting right

The validity of a counterclaim or set-off is determined by whether it would constitute a cause of action by defendant against plaintiff, had plaintiff not sued.[92]

terclaim for damages resulting from failure of the mortgagee to deliver the engine at the time agreed upon, where the mortgage and the notes secured thereby were given by the mortgagor after the delivery of the engine for which the same were executed, without objection on account of the delay in its delivery. Frick Co. v. Stephens, 53 P. 378, 7 Kan. App. 745.

In suit on supersedeas bond, defendant's damages from an unlawful attachment in the action in which bond was executed were not proper subject for counterclaim within Rev. Laws 1910, § 4746. Brisley v. Mahaffey, 64 Okl. 319, 167 P. 984.

Under Rev. St. 1910, § 4746, limiting the use of a counterclaim, a note from plaintiff to a stranger to the suit, and assigned to defendant, cannot be used as a counterclaim where it is in no way connected with, and has no relation to, the contract or transaction made the basis of plaintiff's suit. First Nat. Bank v. Thompson, 137 P. 668, 41 Okl. 88.

In an action for installing a plumbing system and for extras held that matter arising out of a contract, distinct from that sued on, did not constitute a proper counterclaim under Rev. Laws 1910, §§ 4745, 4746. Harris v. Warren-Smith Hardware Co., 44 Okl. 477, 144 P. 1050.

Under Rev. Laws 1910, § 4746, plaintiff cannot plead as counterclaim in action on notes unliquidated damages from unlawful suing out of attachment in former suit in settlement of which notes were executed. Phillips v. Hargadine-McKittrick Dry Goods Co., 59 Okl. 294, 159 P. 320.

Set-off.—A "set-off" is a demand which a defendant makes against the plaintiff in a suit to liquidate the whole or a part of his claim. Drovers' State Bank v. Elliott, 154 P. 255, 97 Kan. 64.

Where a person agrees on certain conditions to be performed by a bank to indorse all notes held by the bank, to 55 per cent. thereof, and makes a special deposit in the bank to secure performance, he is entitled, on failure of the bank to comply with the conditions, to any part of such deposit which has not been properly applied under the agreement, and may set off same in an action against him by the bank on a note. First State Bank of Indiahoma v. Menasco, 55 Okl. 748, 155 P. 261.

Under the statute limiting the use of a set-off (Rev. St. 1910, § 4746), a defendant, in an action for conversion, cannot set off a note given by plaintiff to a stranger to the suit, and assigned to him. First Nat. Bank v. Thompson, 137 P. 668, 41 Okl. 88.

In an action on a contract, a defendant may plead as a set-off any cause of action arising on contract which he may have against plaintiff. Orr v. Gerrold, 57 P. 48, 8 Kan. App. 441.

In an action on a note, held permissible to set up a cross-demand for damages for the wrongful taking and injury by plaintiff of a horse belonging to defendants. Ontjes v. Rhodenbaugh, 132 P. 211, 89 Kan. 533.

[92] Johnson v. Acme Harvesting Mach. Co., 103 P. 638, 24 Okl. 468.

There must be a subsisting right in defendant.[93]

An unadjudicated sum due on open account cannot be set off against a judgment.[94]

§ 620. Equity

Equity can allow a set-off of debts independently of statute where grounds of equitable interposition are shown, such as fraud, insolvency, or nonresidence, rendering it probable that party will lose his demand and be compelled to pay other demand.[95]

A counterclaim may likewise be allowed.[96]

[93] In a purchaser's action against real estate brokers for purchase money paid for land which proved deficient in quantity, the brokers could not offset a sum paid by them to an occupant of the premises to place themselves in position to deliver possession, where such payment was made, not for plaintiff's benefit, but to secure the profit they expected to make on the transaction. Hurford v. Norvall, 39 Okl. 496, 135 P. 1060.

In a carrier's action to recover an undercharge, held, that a set-off could not be allowed for damages on another shipment, where such other shipment was made under a contract prescribing conditions precedent to the allowance of damages, and such conditions had been disregarded. Chicago, R. I. & P. Ry. Co. v. Theis, 152 P. 619, 96 Kan. 494.

Where a defendant did not intend to charge the plaintiff anything for various items when they were furnished, and so testified, he cannot after an action has been commenced, make charges for them, and recover thereon. Collins v. Martin, 23 P. 95, 43 Kan. 182.

In an action on an order to let F. have meat from the 1st of May until further orders, an item of $63.25 which one of plaintiffs, on cross-examination, admits was for meat sold to F.'s husband before the 1st of May, should not be offset against a bill which plaintiffs owe defendant. McNeely v. Duff, 31 P. 1061, 50 Kan. 488.

[94] Colcord v. Conger, 62 P. 276, 10 Okl. 458.

[95] Caldwell v. Stevens, 64 Okl. 287, 167 P. 610, L. R. A. 1918B, 421.

Equity may allow set-offs of mutual demands where such relief is necessary to enable party claiming it to collect his claims, and, where other equitable grounds exist, the insolvency of the party against whom the relief is sought will authorize such equitable remedy. Scrivner v. McClelland, 75 Okl. 239, 182 P. 503.

In suit to recover upon notes and to foreclose mortgage on realty, fourth paragraph of defendant's answer held to state facts sufficient for exercise of jurisdiction in equity to decree set-off. Caldwell v. Stevens, 64 Okl. 287, 167 P. 610, L. R. A. 1918B, 421.

[96] In action to restrain unfair competition, a counterclaim for damages for plaintiff's unlawful use of defendant's trade-name and seeking an injunction is proper, and, if the allegations thereof are sustained, defendant is entitled to the relief. O K Bus & Baggage Co. v. O K Transfer & Storage Co., 63 Okl. 311, 165 P. 136, L. R. A. 1918A, 956.

In an action by the trustee of a trust mortgage to recover the value of certain trust property sold to defendant, a holder by assignment of a note secured by the mortgage, a counterclaim may be properly pleaded, asserting an interest in the application of the proceeds of mortgaged property, and asking an accounting.[97]

In an action to recover money defendant cannot avail himself of an equitable counterclaim involving the foreclosure of a mortgage and the sale of the real estate described therein, which the court has no power to hear, because the premises described in the mortgage are situated in another county, and beyond the jurisdiction of the court where such counterclaim is filed.[98]

§ 621. —— Cross-bill or cross-petition

In foreclosure the defendant cannot by cross-bill set up new matter not maintainable as a counterclaim, unless such matter is involved in a proper determination of the subject-matter of the original suit.[99]

A cause of action set up in a cross-bill against a party made codefendant on motion of original defendant must be germane to original controversy, and a cross-bill wherein such defendant seeks to litigate a new controversy between himself and a codefendant is not maintainable as a counterclaim or cross-bill, but must be litigated against codefendant by a separate action.[1]

In a suit for breach of a contract to exchange realty, defendant may set up a cross-petition, alleging breach by plaintiff, and ask specific performance with prayer in the alternative for damages, though he knows that plaintiff cannot perform.[2]

[97] Wyman v. Herard, 59 P. 1009, 9 Okl. 35.

[98] Lyman v. Stanton, 20 P. 510, 40 Kan. 727.

[99] Tracey v. Crepin, 138 P. 142, 40 Okl. 297.

In foreclosure, a grantee of the mortgagor under a warranty deed could not set up by cross-petition damages against the mortgagor for breach of the covenants in the deed; such matter not being germane to the original action. Id.

[1] Patterson v. Central State Bank, 175 Okl. 147, 182 P. 678.

In an action on a note wherein defendant has additional parties made codefendants, his cross-bill, attempting to litigate a controversy between himself and such co-defendants not germane to the subject matter of the original suit, was properly dismissed. Id.

[2] Stramel v. Hawes, 154 P. 232, 97 Kan. 120.

In the absence of objection, an answer, containing the requisite allegations, may be treated as cross-petition, though not so named by the pleader.[3]

Where defendant, by cross-petition, alleged ownership of personal property and prayed equitable relief, and it appeared that bill of sale under which he claimed, although in his own name, was taken for use of his principal and had been delivered to principal, by which a trust resulted, the proof failed to sustain cause of action alleged, and he could not recover, notwithstanding the statute providing that a trustee, etc., may sue without joining the person beneficially interested.[4]

Where a resident of the state for the statutory time files her petition for divorce, defendant may file a cross-petition and obtain a decree of divorce without alleging that he has resided continually in the state for the year next before his application for divorce.[5]

§ 622. Landlord and tenant

In a landlord's attachment, the tenant may counterclaim for labor performed and money expended in improving the premises under authority from the landlord.[6] The amount of a tenant's counterclaim for work and labor authorized by the landlord is to be determined by the reasonable value of same, and the amount allowable, for money expended is actual expenditure.[7]

Since damages resulting from a breach of the covenant of quiet enjoyment arise out of the lease, they may be recovered by way of counterclaim in an action for rent.[8]

A lessee on discovering fraudulent representations by the lessor of a material fact is not compelled to give up the premises and rescind the contract, but may set off any damage caused thereby on suit for the rent.[9]

In an action for damages for breach of a farm lease contract, a

[3] Miller v. Oklahoma State Bank of Altus, 53 Okl. 616, 157 P. 767.
[4] Frisco Lumber Co. v. Waldock (Okl.) 176 P. 220; Rev. Laws 1910, § 4683.
[5] Newman v. Newman, 112 P. 1007, 27 Okl. 381.
[6] Ratcliff v. Sharrock, 44 Okl. 592, 145 P. 802.
[7] Id.
[8] Hanley v. Banks, 51 P. 664, 6 Okl. 79.
[9] Myers v. Fear, 96 P. 642, 21 Okl. 498, 129 Am. St. Rep. 795.

counterclaim for personal property taken by the tenant must allege ownership thereof in the landlord at the taking.[10]

§ 623. Action against United States

While no affirmative judgment can be rendered against the United States on a set-off in favor of defendant, yet, when the United States sues, it waives its exemption so far as to allow a presentation by defendant of a legal and equitable set-off to the extent of the demand made, but no judgment can be rendered against the United States for any balance found due.[11]

§ 624. Cross-demands—Deprivation

"When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other; but the two demands must be deemed compensated so far as they equal each other." [12]

§ 625. —— . Assignments

When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a set-off could have been set up, neither can be deprived of the benefit of such set-off by the assignment of the other.[13]

[10] Hill v. White, 50 Okl. 573, 150 P. 1051.

[11] United States v. Warren, 71 P. 685, 12 Okl. 350.

[12] Rev. Laws 1910, § 4751.

[13] Gardner v. Risher, 10 P. 584, 35 Kan. 93.

The fact that defendant gave verbal directions to a member of a firm which was indebted to him for his share in the profits on a contract to apply such profits to the payment of a debt due from defendant to such party, and of a note due to plaintiff's assignor who was also a member of such firm, where nothing was ever done under such directions, but the whole of such profits were included in securities afterwards transferred by the firm to secure its own indebtedness, does not affect the right of defendant to set off his share of such profits against a claim prosecuted against him by an assignee of such note, who purchased after maturity thereof, and after the right to such set-off had accrued. Davies v. Stevenson, 54 P. 679, 59 Kan. 648.

Where a building contractor assigns the money due him under the contract to one who has furnished materials for the building, and the assignee sues the owner thereon, the owner can set off against the claim his damages for the wrongful institution of an action formerly brought against him, and prosecuted to final judgment, by such assignee on his claim for material, without making the contractor a party. Tracy v. Kerr, 28 P. 707, 47 Kan. 656.

Where a corporation, through its president, asks that an account owing to him personally by the holder of its note be credited thereon, it amounts to a transfer of the account from the president to the corporation; and in an action on the note plaintiff cannot object to the account being used as a set-off because no formal assignment was made.[14]

§ 626. —— Definition

A "cross-demand" is a demand which is preferred by one party to an action in opposition to a demand already preferred against him by his adversary.[15]

§ 627. Parties and mutuality

It is not necessary that counterclaim arising out of contract or transaction alleged as foundation of claim, or connected with subject of action, exist as between all the parties and the defendant;[16]

[14] Kansas City Paper House v. Foley Ry. Printing Co., 118 P. 1056, 85 Kan. 678, 39 L. R. A. (N. S.) 747, Ann. Cas. 1913A, 294.

[15] Drovers' State Bank v. Elliott, 154 P. 255, 97 Kan. 64.

[16] Cooper v. Gibson (Okl.) 170 P. 220; Robertson v. Howerton, 56 Okl. 555, 156 P. 329.

Under the direct provisions of Acts Ter. Leg. Okl. 1905, p. 328, c. 28, art. 7, § 3, it is not necessary that a set-off or counterclaim shall exist as between all parties to the suit; but any party may enforce his set-off or counterclaim against the liability sought to be enforced against him. Loeb v. Loeb, 103 P. 570, 24 Okl. 384.

One joint maker of a note can set off against it an indebtedness from the payee due him individually. McKay v. H. A. Hall & Co., 30 Okl. 773, 120 P. 1108, 39 L. R. A. (N. S.) 658; Curlee v. Ruland, 56 Okl. 329, 155 P. 1182.

Where a purchaser of merchandise from a firm agreed to pay certain notes and account owed by the firm, and gave his note to the partners, who owned all the property, and in suit thereon counterclaimed on the notes and account which had been assigned to him, the plaintiff is entitled to the benefit of the promise to the firm to pay such notes and account. Danielson v. Scott, 129 P. 1190, 88 Kan. 789.

E. transferred cattle and other property to defendants under a contract by which the latter undertook, inter alia, to assume the payment of damages due to plaintiff on account of his cattle having become infected with a fever prevalent among such cattle of E., by reason of E.'s negligence. Plaintiff thereupon brought suit on the contract, as the party for whose benefit it was made, to recover such damages. Held, that defendants are entitled to set off against this claim an indebtedness of plaintiff to them, existing before the contract with E. was made. Clay v. Woodrum, 25 P. 619, 45 Kan. 116.

Under the express provisions of Comp. Laws 1909, § 5635, a defendant may plead and prove a set-off or counterclaim of a proper nature in defense of the liability sought to be enforced by the plaintiff; and it is not necessary that

but there must be privity of parties to entitle defendant to plead a set-off, and defendant cannot plead a set-off in favor of himself and against one not a party to the suit.[17]

§ 628. —— New party—Counterclaim

"When it appears that a new party is necessary to a final decision upon a counterclaim, the court may either permit the new party to be made by a summons to reply to the counterclaim, or may direct the counterclaim to be stricken out of the answer, and made the subject of a separate action." [18]

§ 629. —— New party—Set-off

"When it appears that a new party is necessary to a final decision upon the set-off, the court shall permit the new party to be made, if it also appear that, owing to the insolvency or non-residence of the plaintiff, or other cause, the defendant will be in danger of losing his claim, unless permitted to use it as a set-off." [19]

§ 630. Form and requisites

A counterclaim must be pleaded as fully and distinctly and with the same substantial requisites as an original cause of action, must be sufficient within itself without recourse to the pleadings, unless by express reference,[20] should be separately stated, and must show with certainty the character of claim, how it accrued, and the facts making it a proper subject of counterclaim or cross-petition.[21]

the same shall exist as between all parties plaintiff and defendant in such action. Stauffer v. Campbell, 30 Okl. 76, 118 P. 391.

[17] Van Arsdale v. Edwards, 101 P. 1123, 24 Okl. 41.

An overpayment to the president and secretary of a corporation could not be set off as against an amount due the corporation in an action to which the president and secretary were not parties. Peck-Williamson Heating & Ventilating Co. v. Board of Education, Oklahoma City, 50 P. 236, 6 Okl. 279.

[18] Rev. Laws 1910, § 4749.

[19] Rev. Laws 1910, § 4750.

[20] Mathews v. Sniggs, 75 Okl. 108, 182 P. 703.

[21] Id.

In action for breach of contract to purchase plants, plea setting up as set-off breach of another contract to plant seed and ship to defendant any fit roots held subject to demurrer for failure to show that plaintiff produced roots fit for defendant's purposes. Barteldes Seed Co. v. Mitchell, 59 Okl. 65, 157 P. 935.

§ 631. Notice

Where a judgment is set aside and an answer asking for affirmative relief filed, notice of the same must be given to the parties affected thereby.[22]

§ 632. Waiver

The right of set-off existing between parties owing each other may, on valuable consideration, be waived.[23]

In suit on supersedeas bond, with counterclaim for damages from unlawful attachment in action in which bond was executed, plaintiff, by replying and joining issue of former adjudication, waived objection that such damages were not proper subject for a counterclaim.[24]

§ 633. Withdrawal

"The court, at any time before the final submission of the cause, on motion of the defendant, may allow a counterclaim or set-off, set up in the answer, to be withdrawn, and the same may become the subject of another action; on motion of either party, to be made at the time such counterclaim or set-off is withdrawn, an action on the same shall be docketed and proceeded in as in like cases after process served; and the court shall direct the time and manner of pleading therein. If an action be not so docketed, it may afterwards be commenced in the ordinary way." [25]

§ 634. Neglect to claim—Cost

"If the defendant omit to set up a counterclaim or set-off, he cannot recover costs against the plaintiff in any subsequent action thereon; but this section shall not apply to causes of action which

[22] One of several defendants procured the judgment rendered in the case to be set aside as to him, upon the ground that no sufficient service of summons was ever made upon him. Afterwards, he filed an answer in the action setting up new matter and grounds for affirmative relief, which affected the rights and interests of several of the other parties and other persons, without giving such other parties or persons any notice or any opportunity to appear and defend. Held, that the court might, upon the hearing on such answer, refuse to grant the relief prayed for in such answer, and dismiss this new proceeding without prejudice. Clay v. Hildebrand, 24 P. 962, 44 Kan. 481.

[23] Stacy v. Cook, 61 P. 399, 62 Kan. 50.

[24] Brisley v. Mahaffey, 64 Okl. 319, 167 P. 984.

[25] Rev. Laws 1910, § 4771.

are stricken out of, or withdrawn from the answer, as in sections 4749 and 4771." [26]

§ 635. Forms

ANSWER SETTING UP COUNTERCLAIM OR SET-OFF

(Caption.)

Comes now the defendant, and in answer to the plaintiff's petition filed herein states:

1. That he denies each and every material allegation made by plaintiff in his petition, except (here state matters not denied).

2. That he has a counterclaim (or set-off) against plaintiff as follows: (State in similar manner as though defendant were plaintiff, stating his cause of action in his petition.)

Wherefore defendant prays that judgment for plaintiff be denied, and that judgment be rendered for defendant against the plaintiff for the sum of ——— dollars, and for his costs.

(Signature) Attorneys for Defendant.

Division V.—Unauthorized Pleas

§ 636. Plea in abatement

There is no provision for a plea in abatement, and such a pleading, if sustained, must be treated as a demurrer or an answer.[27]

§ 637. Plea in bar

Under the statute providing that the pleadings authorized are petition by plaintiff, answer or demurrer by defendant, demurrer or reply by plaintiff, and demurrer by defendant to reply, a plea in bar is unauthorized.[28]

[26] Rev. Laws 1910, § 4748.

[27] Patterson v. Choate, 50 Okl. 761, 151 P. 620; Maxia v. Oklahoma Portland Cement Co. (Okl.) 176 P. 907; Sweet v. Crane, 39 Okl. 248, 134 P. 1112.

In a suit for damages from the levy of an attachment, a defendant's motion to abate, alleging that it was necessary to maintenance of suit that it be finally adjudicated that attachment was wrongfully obtained, would be regarded as an answer to the petition. Nation v. Savely (Okl.) 176 P. 937.

The court was probably incautious in the use of terms in holding in 1899 that the point that plaintiff is not a corporation should be raised by a special plea in the nature of a plea in abatement. Leader Printing Co. v. Lowry, 59 P. 242, 9 Okl. 89.

[28] Anderson v. State, 140 P. 1142, 42 Okl. 151; Rev. Laws 1910, § 4736.

ARTICLE VI

REPLY

Sections

638. Reply or demurrer.
639. When reply necessary.
640. Counterclaim or set-off in reply.
641. Demurrer or reply to answer by codefendant.
642. Construction and effect.
643. Requisites and sufficiency—Forms.
644. Departure.
645. Waiver of objections.

§ 638. Reply or demurrer

"When the answer contains new matter, the plaintiff may reply to such new matter, denying, generally or specifically, each allegation controverted by him; and he may allege, in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition, constituting a defense to such new matter in the answer; or he may demur to the same for insufficiency, stating, in his demurrer, the grounds thereof; and he may demur to one or more of such defenses set up in the answer, and reply to the residue." [29]

§ 639. When reply necessary

Where the answer contains no new matter and amounts to no more than a denial of the petition, no reply is necessary.[30]

[29] Rev. Laws 1910, § 4753.

[30] Wichita Falls & N. W. Ry. Co. v. Puckett, 53 Okl. 463, 157 P. 112.

In suit on contract and bond, a verified general denial did not constitute "new matter," entitling plaintiff to a reply thereto. Detroit Automatic Scale Co. v. Taylor (Okl.) 169 P. 908.

No reply need be filed where the answer does not set up new matter, but merely evidentiary facts by way of denial. Denman v. Brennamen, 48 Okl. 566, 149 P. 1105, L. R. A. 1915E, 1047.

In an action upon a forfeited recognizance, the defendant, by a verified answer, averred that he signed the instrument when it was yet incomplete and what is known commonly as a blank recognizance, the blank spaces left therein for the name of the county, the offense charged, the amount in which the prisoner was held and the court before which he was required to appear, being left unfilled, and that he attached his name to it upon the condition that another person should join him in signing the recognizance, and, when so signed, the blanks should be filled out by the co-surety and the instrument delivered, and that unless it was so executed he was not to become liable thereon. He also alleged that the recognizance was not signed or completed by the other

New matter in an answer which does not constitute a defense to plaintiff's petition, does not require a reply.[31]

A set-off or counterclaim in an answer requires a reply;[32] but defendant need file no reply to such reply.[33]

The plaintiff in an action against a carrier of live stock, in order to avoid a valid limitation of liability set up in the answer, must plead any deceit or fraud practiced upon him in obtaining his assent to the contract.[34]

party, and therefore that he was not liable thereon. Held, that this answer was in substance and effect a denial that the recognizance sued on had been executed by him, and a verified reply by the plaintiff denying the allegations of the answer was unnecessary. Madden v. State, 10 P. 469, 35 Kan. 146.

A general denial was filed to the original answer of defendants, and afterwards a supplemental petition was filed. Defendants answered again fully to the merits of the action, but did not set forth any new matter. Held, that another reply was unnecessary. Dreiling v. First Nat. Bank, 23 P. 94, 43 Kan. 197, 19 Am. St. Rep. 126.

A reply is unnecessary where it would merely repeat, in effect, the allegations of the petition. Muskogee Vitrified Brick Co. v. Napier, 126 P. 792, 34 Okl. 618.

An answer which, after a general denial of the negligence charged, alleges that any injuries sustained were the result of plaintiff's own negligence does not call for a reply. Chicago, R. I. & P. Ry. Co. v. Pitchford, 44 Okl. 197, 143 P. 1146.

Where answer to plea of intervention contains a general denial, and affirmative matter amounting to a denial only of the matters set up in the plea, intervener need not file a denial of such affirmative matter. Farmers' State Bank of Ada v. Keen (Okl.) 167 P. 207.

The answer, in a suit to cancel a deed as a forgery, held to be in effect a general denial of the allegation of forgery, to which no reply was necessary in order to render admissible evidence offered to establish forgery. Cox v. Gettys, 53 Okl. 58, 156 P. 892.

[31] West v. Cameron, 18 P. 894, 39 Kan. 736, judgment affirmed on rehearing, 19 P. 616; Owens v. Farmers' & Merchants' Bank of Duke, 54 Okl. 387, 154 P. 355.

[32] Where the petition set out an agreement with an itemized account thereunder showing a balance due plaintiff, and defendant, after controverting part of the allegations, set up the agreement, but alleged a different result growing out thereof, and set up an itemized account as a counterclaim, showing a balance due him, it constituted a counterclaim, which required a reply. Aiken v. Franz, 43 P. 306, 2 Kan. App. 75.

[33] When a defendant in an action to foreclose a mortgage sets up in his answer a note and mortgage executed by a codefendant, on which judgment is asked, the reply thereto filed by such codefendant is the final pleading, and any allegation of new matter in such reply is deemed controverted. Hughes v. Durein, 44 P. 434, 3 Kan. App. 63.

[34] St. Louis & S. F. R. Co. v. Zickafoose, 39 Okl. 302, 135 P. 406.

§ 640. Counterclaim or set-off in reply

Where defendant in a civil action files an answer, which, in addition to a defense, alleges facts constituting a new cause of action by way of set-off, and prays for judgment, plaintiff may not in his reply aver new matter constituting a counterclaim or set-off on which he asks for affirmative relief, but his statements must be confined to facts constituting a defense to the answer.[35]

§ 641. Demurrer or reply to answer by codefendant

"Where the answer contains new matter constituting a right to relief against a codefendant concerning the subject of the action, such codefendant may demur or reply to such matter in the same manner as if he were plaintiff, and subject to the same rules, as far as applicable." [36]

§ 642. Construction and effect

An allegation in an answer is to be taken as true when the plaintiff, in reply, pleads in confession and avoidance.[37]

An unverified reply to an answer setting up a written contract does not admit defendant's construction of the contract so as to authorize a judgment on the pleadings;[38] but a mere general denial admits that the contract is as alleged.[39]

[35] Beakey v. Vander Meerschen, 78 Kan. 538, 97 P. 478.

[36] Rev. Laws 1910, § 4755; Long v. Harris, 132 P. 473, 37 Okl. 472.

[37] Meeh v. Missouri Pac. Ry. Co., 60 P. 319, 61 Kan. 630.

In an action by officers of grand lodge for moneys paid defendant by the treasurer of the lodge, admission in reply held sufficient, in absence of evidence to sustain matter in avoidance, to sustain a verdict for defendant. Washbon v. Hixon, 121 P. 518, 86 Kan. 406.

[38] McKnight v. Strasburger Bldg. Co., 150 P. 542, 96 Kan. 118.

[39] Plaintiff sued defendant carrier for the deterioration of a shipment of live stock, alleging shipment under a written contract which could not be produced because it was in the hands of the defendant. Defendant attached the alleged contract to its answer, which contained a stipulation requiring notice of damage to be served on the railroad company's agent within one day after the delivery of the stock at destination, and declaring that a failure to comply therewith should bar any recovery. The answer alleged that such requirement had not been complied with, after which plaintiff filed a reply setting up only a general denial. Held, that the written contract was thereby admitted as alleged. St. Louis & S. F. R. Co. v. Cake, 105 P. 322, 25 Okl. 227.

§ 643. Requisites and sufficiency—Forms

Where the answer alleges that the note sued on is ultra vires, a demurrer to a reply containing a general denial is properly overruled.[40]

Failure to file a reply controverting the allegations of the answer in an action on notes setting up the illegality of the contract in connection with which the notes were given operates as an admission of the facts alleged relative thereto.[41]

Where a railroad employé was killed, and after a settlement with the widow a son was born and the widow qualified as administratrix and set up the son's rights as a beneficiary, and the railroad pleaded the settlement, a reply that the settlement was only of the widow's individual rights, or that, if it embraced the rights of the child, it did not express the true contract, was not demurrable.[42]

In an action by the vendor for the specific performance of a contract for the sale of real property, an allegation in the answer that the plaintiff has never tendered a deed executed by himself is met by allegations in the reply that no previous objection had been made upon that ground to the deed which he had tendered, and that he had at all times been and was still able and willing to furnish such a deed.[43]

Allegations of new matter in an answer may call for a verified denial, where the same allegations in a petition would do so.[44]

REPLY—SUIT TO CANCEL CONVEYANCES

(Caption.)

Come now the plaintiffs and for reply say that the land in question was worth for agricultural purposes at least fifty dollars per

[40] Western & Southern Fire Ins. Co. v. Murphey, 56 Okl. 702, 156 P. 885.

[41] Howard v. Farrar, 114 P. 695, 28 Okl. 490.

[42] Herndon v. St. Louis & S. F. R. Co., 128 P. 727, 37 Okl. 256.

[43] Geo. H. Paul Co. v. Shaw, 119 P. 546, 86 Kan. 136, 37 L. R. A. (N. S.) 1123, Ann. Cas. 1913B, 956.

[44] Defendant in ejectment claimed title under certain tax deeds, and in his answer alleged their due execution and the validity of all proceedings anterior thereto; but it appeared on the face of such deeds, which were exhibited as part of the answer, that they were void. Plaintiff's reply was a general denial, unverified. Held, that the reply is not sufficient to put in issue the validity of the tax deeds and proceedings. Tweedell v. Warner, 23 P. 603, 43 Kan. 597.

acre. They say that the option relied on as the foundation of defendant's claim was purchased by F. S. and P. C. for one thousand dollars with money procured from plaintiffs, furnished by O. R.; that said O. R., as a part of the trade made with defendants, and with the help of defendants, and by the help of F. S. and P. C., who pretended to act as the agent of plaintiffs, procured a half interest in the property jointly with defendants; that P. C. acted as the agent of plaintiffs in making the O. R. deed, and the deal with defendants, and proceeded to sell one-half to said O. R. as said agent for a consideration of twenty-eight thousand dollars, and was paid a commission by plaintiffs of five per cent., and said O. R. paid said P. C. four thousand five hundred dollars as a commission for making the deal with him and defendant; that these facts developed for the first time on the trial of a case against said O. R. held in this court February 25, 1918, to cancel his deed.

That the contract of F. S. and P. C. with reference to securing a conveyance to F. S. developed fully for the first time in this trial on June 19, 1917, on a suit of plaintiffs to set aside a conveyance to said P. C. of one-fourth of the land, made at the same time said defendant procured his deed herein attacked; that the O. R. deal, the P. C. deal, and defendants' deal were all part of one transaction, and the making of each depended and was conditioned on the making of the other; that said O. R. and his agents and said P. C. and F. S. and the defendants and their agents acted in concert, and with a design to get plaintiffs' property for less than its value and proceeded to incumber it as much as possible, and also to render it difficult for plaintiffs to clear the title thereto and with a design of imposing on the plaintiffs, and to take advantage of said ———'s needs of money and his spendthrift propensities; that the conduct of said O. R. in bribing his agent were unknown to plaintiffs until the trial of the O. R. suit, and all the details are yet unknown. They say that they do not now know and understand all the material facts connected with the execution of said deeds, and they say that there are no innocent purchasers from said defendant, and defendants F. E. and R. H. paid nothing and knew all the facts. They say that as soon as they learned of the fraudulent conduct of defendant and his co-conspirators they began this suit to set aside defendants' deed. They say that there never was any consideration for defendants' deed, and defendants have been fully paid for anything

that he had parted with. They say they deny all allegations of new matter in the amended answer not herein admitted, and pray as in their petition.

———.
———.

State of Oklahoma,
County of ———. } ss.:

A. M. and B. M., of lawful age, being first duly sworn, on oath states: That they are the plaintiffs in the above entitled cause, that they have read the within and foregoing, and that the same is true and correct, as they verily believe.

———.
———.

Subscribed and sworn to before me this ——— day of ———, 19—.

(Seal.) ———.

REPLY—DEFENSE TO COUNTERCLAIM

(Caption.)

Comes now the above named plaintiff, and for its reply to the answer of defendant to plaintiff's amended petition, filed herein, alleges and states:

1. That it denies each and every allegation therein contained, except such as are hereinafter specifically admitted.

2. For further reply and defense to such answer, and to the alleged set-off, plaintiff alleges and states: (Set forth defense to counterclaim in similar manner as though plaintiff were defendant, stating his defense and answer to petition filed against him.)

Wherefore plaintiff prays that defendant take nothing by reason of his alleged counterclaim, and that plaintiff have judgment as prayed for in plaintiff's amended petition filed herein.

(Signatures) Attorneys for Plaintiff.

§ 644. Departure

Where the plaintiff alleges performance of all the conditions of a contract, and defendant charges various breaches, a reply admitting failure to perform, and pleading estoppel and waiver, constitutes a departure.[45]

[45] Gage v. Connecticut Fire Ins. Co. of Hartford, Conn., 127 P. 407, 34 Okl. 744; Springfield Fire & Marine Ins. Co. v. Halsey, 126 P. 237, 34 Okl. 383;

In an action of ejectment it is improper to permit plaintiff, over objection, to file a reply setting up a cause of action to quiet title, since the claim of plaintiff is substantially changed.[46]

Where the petition alleges ownership generally, but the reply admits the ownership to be special, as that of a mortgagee, such change of allegations constitutes a departure.[47]

Where allegations in a reply are mere repetition, in a slightly changed form of matter already alleged in the amended petition, and are not contradictory thereof, the reply is not objectionable as a departure.[48]

New matter in the reply which plaintiff is forced to plead in order to meet the allegations of the answer will not constitute departure if it does not contradict the facts stated in the petition, and if it is not adopted for a new basis for relief in place of the cause of action presented by the petition.[49]

Merchants' & Planters' Ins. Co. v. Marsh, 125 P. 1100, 34 Okl. 453, 42 L. R. A. (N. S.) 996; Union Casualty & Surety Co. v. Bragg, 65 P. 272, 63 Kan. 291; St. Paul Fire & Marine Ins. Co. v. Mountain Park Stock Farm Co., 99 P. 647, 23 Okl. 79.

[46] Bear v. Cutler, 86 Kan. 66, 119 P. 713.

[47] Johnson v. State Bank of Seneca, 52 P. 860, 59 Kan. 250.

[48] Landon v. Morehead, 126 P. 1027, 34 Okl. 701.

[49] Hunter Milling Co. v. Allen, 88 P. 252, 74 Kan. 679, 8 L. R. A. (N. S.) 291.

In action on school warrants, with answer that they were unlawfully issued, without consideration, and are void, reply setting up estoppel held not a departure. Home State Bank v. School Dist. No. 17, 102 Kan. 98, 169 P. 202.

Where petition set forth certain letters constituting contract of agency, and the answer was a denial and an allegation of want of authority, and the reply pleaded other correspondence to support the contract, it did not constitute a departure. Sturgeon v. Culver, 124 P. 419, 87 Kan. 404, Ann. Cas. 1913E, 341.

Plaintiff pleaded that an oral contract had been violated by defendant, who alleged that the contract was in writing and set up a brief memorandum. The reply admitted the signing of the memorandum, but alleged that it was only a part of the contract, and set forth the remaining stipulations which were oral. Held not to constitute a departure. Heskett v. Border Queen Mill & Elevator Co., 105 P. 432, 81 Kan. 356.

Allegation of the answer that insurer had fraudulently misrepresented in her proof of loss the value of the property was put in issue by general denial; and further allegations in the reply, as to waiver of conditions of the policy, were surplusage, and did not constitute a material variance. American Ins. Co. of Newark, N. J., v. Rodenhouse, 128 P. 502, 36 Okl. 211; Rochester German Ins. Co. of Rochester, N. Y., v. Rodenhouse, 128 P. 508, 36 Okl. 378; Georgia Home Ins. Co. v. Halsey, 133 P. 202, 37 Okl. 678.

A reply, admitting that suit was commenced after expiration of the limi-

Where breach of condition subsequent has been pleaded as a defense, a reply alleging a waiver or estoppel is not a departure.[50]

§ 645. Waiver of objections

The fact that a denial in the reply is pregnant with one or more admissions is immaterial, where the parties are compelled to resort to their proof as if the reply were of good character.[51]

Failing to move to strike a reply, constituting a departure and going to trial, waives the defect.[52]

tation period prescribed by the Indian Territory policy sued on, but pleading facts which, if true, would estop defendant from taking advantage of such clause as a defense, held not a departure. Northwestern Nat. Life Ins. Co. Ward, 56 Okl. 188, 155 P. 524.

In action on benefit certificate, where petition pleaded full performance of all conditions precedent, and answer alleged a breach of warranty, a reply pleading waiver and estoppel was not such a departure as to warrant a reversal of judgment for plaintiff. Miller v. National Council of Knights and Ladies of Security, 103 Kan. 579, 175 P. 397.

[50] Springfield Fire & Marine Ins. Co. v. Null, 133 P. 235, 37 Okl. 665; Western Reciprocal Underwriters' Exchange v. Coon, 38 Okl. 453, 134 P. 22; Queen Ins. Co. of America v. Dalrymple, 60 Okl. 28, 158 P. 1154; German-American Ins. Co. of New York v. Lee, 51 Okl. 28, 151 P. 642.

Quieting title.—Where defendants, in an action to quiet title, plead facts showing that they are tenants in common as to a one-third interest, a reply admitting that they hold the naked legal title to the extent of that interest, and alleging that they have sold and received the consideration for such interest, and that a deed was given therefor with their consent by one supposed by all parties to have authority as trustee to convey the land, does not constitute a departure. Neve v. Allen, 41 P. 966, 55 Kan. 638.

In an action to quiet title and to cancel a contract purporting to have been made by plaintiff's agent with defendant for the exchange of lands on the ground that the execution thereof was not authorized, and to cancel a deed conveying the land on the ground that it had not been delivered where the answer avers the due execution of the contract and its subsequent ratification and the performance of the agreement by defendant and the delivery of the deed, and prayed for judgment for possession, a reply, containing a general denial, and pleading, after the alleged agreement, that defendant and the owners of the land to be exchanged with plaintiff had incumbered it by granting a telephone right of way and had leased the land, and that defendant had no title to the premises, does not set up a new cause of action, but pleads defense that the contract was not in force and is not a departure. Snyder v. Wheeler, 106 P. 462, 81 Kan. 508.

[51] Danielson v. Scott, 129 P. 1190, 88 Kan. 789.

[52] Wampler v. Stemen, 80 Okl. 240, 195 P. 764.

ARTICLE VII

FILING AND SUBSCRIBING

Sections
646. Time for filing.
647. Additional time—Withdrawal—Service of amendment.
648. Signing.

§ 646. Time for filing

"The answer or demurrer, by the defendant, shall be filed within twenty days after the day on which the summons is returnable; the reply or demurrer shall be filed within thirty days after the day on which the summons was made returnable; the demurrer to the reply shall be filed within forty days after the day on which the summons was made returnable." [53]

Where there has been a service of summons by publication, a subsequent personal service on defendant voluntarily within the jurisdiction supersedes the former service and fixes the answer date.[54]

A pleading filed out of time without permission or agreement is a nullity.[55]

It has been the policy of the court to discourage the practice of refusing to permit defendants to file an answer out of time and to give litigants their day in court, and to protect parties having a valid defense, especially where they are ignorant Indians.[56]

After a defendant in default has been allowed to answer, and instead of doing so has filed a motion to make more definite and certain, which has been stricken from the files, and the case called for trial, it is not an abuse of the court's discretion to refuse to allow him to answer then.[57]

Where defendant's demurrer is overruled, and time given him to

[53] Rev. Laws 1910, § 4756.

[54] Where plaintiff, a resident, sued defendant, a resident of Texas, and caused service of summons on defendant in Texas, requiring answer to petition on or before April 14, 1914, such service being, under Rev. Laws 1910, § 4727, a service by publication, a subsequent personal service on defendant voluntarily within the trial court's jurisdiction superseded the former summons and fixed the answer date. Dickinson v. Foot (Okl.) 173 P. 522.

[55] State Nat. Bank v. Lowenstein, 52 Okl. 259, 155 P. 1127.

[56] McCoy v. Mayo (Okl.) 174 P. 491.

[57] Missouri Pac. Ry. Co. v. Linson, 18 P. 498, 39 Kan. 416.

file his answer, but he does not file it in time, and he afterwards makes application for further time, on the ground that papers necessary to drawing the answer had only been procured a few days before, but no answer is presented with the application, it is within the discretion of the trial court to deny such application.[58]

Defendant cannot complain that on the day of trial plaintiff was allowed to file a reply to the answer.[59]

§ 647. Additional time—Withdrawal—Service of amendment

"The court, or any judge thereof in vacation, may, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this article, or by an order enlarge such time." [60]

The granting or refusal of an application to file pleadings out of time is largely in discretion of trial court.[61]

This discretion is dependent upon all the circumstances and must not be used arbitrarily or capriciously.[62]

While laches in filing pleadings should not be encouraged, the court should grant permission to file at all times when justice requires it.[63]

It is not error for a trial court to permit a party to withdraw an interplea.[64]

Where statements or admissions in a pleading against his interest were made by a party or his counsel under an honest mistake as to the facts, and he desires to be relieved of the effects thereof, he should apply to the trial court for leave to withdraw such admission and make a showing of good faith in support of his application.[65]

Where an action was brought by two coplaintiffs and on demurrer the court ordered separate actions to be brought in their names, and

[58] Merten v. Newforth, 25 P. 204, 44 Kan. 705.

[59] Sulzberger & Sons Co. of Oklahoma v. Strickland, 60 Okl. 158, 159 P. 833.

[60] Rev. Laws 1910, § 4757.

[61] City of Lawton v. Kelley, 62 Okl. 291, 162 P. 1081.

Permission to file pleadings out of time rests under Comp. Laws 1909, § 5646, in the discretion of the court, to be exercised in the light of the circumstances. Long v. Harris, 132 P. 473, 37 Okl. 472.

[62] Checotah Hardware Co. v. Hensley, 141 P. 422, 42 Okl. 260.

[63] Peck v. First Nat. Bank of Claremore, 50 Okl. 252, 150 P. 1039.

[64] Jackson v. Glaze, 41 P. 79, 3 Okl. 143.

[65] Rogers v. Brown, 86 P. 443, 15 Okl. 524.

in filing them the name of one plaintiff was omitted, an amendment to supply such name was a compliance with the order that separate actions be filed in the name of both plaintiffs, and service of amendment on defendant is unnecessary before judgment of default may be rendered.[66]

§ 648. Signing

"Every pleading, in a court of record, must be subscribed by the party or his attorney." [67]

ARTICLE VIII

AMENDED AND SUPPLEMENTAL PLEADINGS

Sections

649. Amendment before answer.
650. Formal defects.
651. Allowance of amendment—Discretion—Forms.
652. Variance.
653. Failure of proof.
654. Amendment on demurrer.
655. Continuance after amendment.
656. Notice of amendment.
657. Interlineation.
658. Subject-matter of amendment.
659. Supplemental pleadings.
660. Lost pleadings.

§ 649. Amendment before answer

"The plaintiff may amend his petition without leave, at any time before the answer is filed, without prejudice to the proceedings; but notice of such amendment shall be served upon the defendant or his attorney, and the defendant shall have the same time to answer or demur thereto as to the original petition." [68]

The provision for notice, applies only to voluntary amendments, and not to those made by order of court upon motion or demurrer.[69]

[66] National Surety Co. v. Oklahoma Presbyterian College for Girls, 38 Okl. 429, 132 P. 652.

[67] Rev. Laws 1910, § 4758.

[68] Rev. Laws 1910, § 4787.

Under Code Civ. Proc. § 137 (Gen. St. 1915, § 7029), plaintiff, before an answer is filed, may amend his petition as to subject-matter and parties without leave of court. Wagler v. Tobin, 104 Kan. 211, 178 P. 751.

[69] Harn v. Missouri State Life Ins. Co. (Okl.) 173 P. 214.

§ 650. Formal defects

"The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or conform the pleading or proceeding to the facts proved, when such amendment does not change substantially the claim or defense; and when any proceeding fails to conform, in any respect, to the provisions of this Code, the court may permit the same to be made conformable thereto by amendment." [70]

Amendments to pleadings may be allowed in furtherance of justice when they do not substantially change the cause of action or defense; this change not referring to the form of the remedy, but to the general identity of the transaction.[71]

[70] Rev. Laws 1910, § 4790.

[71] Snider v. Windsor, 93 P. 600, 77 Kan. 67; Mathews v. Sniggs, 75 Okl. 108, 182 P. 703; Edmondston v. Porter (Okl.) 162 P. 692; Merchants' & Planters' Ins. Co. v. Crane, 128 P. 260, 36 Okl. 160; Trower v. Roberts, 30 Okl. 215, 120 P. 617.

Amendments may be allowed before or after judgment by inserting allegations material to case not changing substantially plaintiff's case. Elliott v. Coggswell, 56 Okl. 239, 155 P. 1146.

Where, in an action against a city to recover damages caused by a defective sidewalk, an objection is made at the trial to evidence on the ground that the petition did not show where the injury complained of occurred, and it appears that the action was against the city, and the petition charged that the accident occurred on North Fifth street between W. and N. streets, without stating the name of the city, it was not error to permit plaintiff to add by way of amendment, when the objection was raised, "in the city of Guthrie, Logan county, O. T." City of Guthrie v. Finch, 75 P. 288, 13 Okl. 496.

In an action for the death of cattle claimed to have been poisoned by drinking compound escaping from poison vats maintained by defendant railroad, the allowance of an amended petition after the close of the evidence held not error. Midland Valley R. Co. v. Rippe, 61 Okl. 314, 161 P. 233.

In an action by a broker for commission, held not error to permit plaintiff during the trial to amend his petition by inserting an allegation that the amount agreed to be paid was the usual and reasonable commission customarily paid to real estate agents. Lowenstein v. Holmes, 40 Okl. 33, 135 P. 727.

When an action to enjoin the doing of an act which, it is alleged, would cause irreparable injury to plaintiff, has been pending in the district court for three years, it is not error to refuse plaintiff leave to so amend his petition as to change the action from one for injunction to one for damages sus-

tained since the commencement of the action. Dever v. City of Junction City, 47 P. 152, 5 Kan. App. 180.

There is no error in permitting plaintiff to amend his petition by striking out allegation that deceased employé was engaged in interstate commerce at time of injury. Lusk v. Phelps (Okl.) 175 P. 756.

An amended and supplemental petition in an action for damages for breach of contract, which alleged that since commencement of the suit the matters in controversy had been submitted to arbitration, and defendant had been found indebted to plaintiff in a certain sum in a written award on which plaintiff prayed judgment, held properly allowed in view of Rev. Laws 1910, § 4795. Wynnewood Cotton Oil Co. v. Moore, 54 Okl. 163, 153 P. 633. Under Rev. Laws 1910, § 4795, amendments are liberally allowed in the furtherance of justice, even though they change the cause of action, provided they do not substantially change plaintiff's claim. Id.

Where a petition in an action against a railroad company for damages resulting from fire alleges that the fire was negligently communicated from one of defendant's engines to the grass growing along the track, it is not error to permit an amendment, more than seven years after the filing of the original petition, by adding that the company was negligent in permitting dry vegetation to accumulate and remain on the right of way where the fire was set out, as such an amendment does not constitute a separate and distinct cause of action. St. Louis & S. F. Ry. Co. v. Ludlum, 66 P. 1045, 63 Kan. 719.

In an action against a city for injuries caused by a defective sewer, an amendment to the petition showing that one of the plaintiffs, originally alleged to be an owner, had no interest in the property, was not material, and did not change the cause of action, as under the Code judgment could be rendered for or against one of several plaintiffs. Kansas City v. King, 68 P. 1093, 65 Kan. 64.

Plaintiffs sued to recover damages from a purchase of potatoes sold under a guaranty that they were sound, whereas a great portion was unmerchantable. They amended their petition to allege that defendant so loaded the car that plaintiff could inspect only the top before they were compelled to pay, and that defendant, fraudulently to deceive plaintiff, had placed on top of the car sound potatoes and at the bottom unmerchantable potatoes. Held, that the amendment was properly allowed under Comp. Laws 1909, § 5679, as it did not change substantially the claim of plaintiff. Z. J. Fort Produce Co. v. Southwestern Grain & Produce Co., 108 P. 386, 26 Okl. 13.

Where the petition originally alleged that plaintiff was working and digging in a ditch, and engaged in dressing the bottom of the ditch, which was about 20 inches wide and 15 feet deep, and the ditch and banks, or side walls, were composed of loam, sand, and dirt, which was of such a character as to be predisposed to cave in and slide when without restraint, and that defendants had carelessly failed to shore up the walls to prevent it from caving in, and that the plaintiff was inexperienced and ignorant of the dangerous character of the employment and of the inexperience and incompetency of his employers and their employés, and at the time of the injuries complained of, he was pursuing his employment in the usual way when, without fault on his part, the banks of the ditch caved in on him, there was no error in permitting an amendment by inserting allegations that the condition of the embankment, at the time of the injuries, and the accumulated dirt and other substance thrown thereon, was predisposed to slide and cave in; and the failure of the defend-

§ 651. Allowance of amendment—Discretion—Forms

The allowance of amendments to pleadings is within the sound discretion of the trial court,[72] whether before or at commencement

ants to remove and clear away the same, so as to prevent its falling into the ditch and injuring the employés, concurred with the other careless acts alleged to bring about the injuries to the plaintiff. Chas. T. Derr Const. Co. v. Gelruth, 120 P. 253, 29 Okl. 538.

Under Rev. Laws 1910, § 4790, allowing amendments not substantially changing the claim or defense, a petition alleging failure of the defendant city treasurer to pay over money belonging to the city may be amended to set out that defendant converted the money to his own use. Shipley v. City of Lawton, 51 Okl. 575, 152 P. 119; Missouri Pac. Ry. Co. v. Henrie, 65 P. 665, 63 Kan. 330.

In a suit on a written contract for the construction of a building, the plaintiff may be allowed to amend at the trial by adding a quantum meruit count for labor and materials furnished. School Dist. No. 2 in Wabaunsee County v. Boyer, 26 P. 484, 46 Kan. 54.

An amendment to a petition by inserting an allegation affecting plaintiff's eligibility to hold the office is properly allowed, where it is in furtherance of justice, and does not substantially change plaintiff's claim. Lewis v. Bandy, 45 Okl. 45, 144 P. 624.

An amendment, stating definitely a ground of negligence which was stated in the original petition in general terms, does not state a new cause of action. Ballard v. Kansas City, M. & O. Ry. Co., 148 P. 764, 95 Kan. 343.

Where the petition sets forth a contract, alleges part performance by plaintiff and breach by defendant, and demands judgment for services performed by plaintiff, etc., it is not error to permit an amendment, alleging usual price for such services and praying judgment for reasonable value thereof. Elwood Oil & Gas Co. v. McCoy (Okl.) 179 P. 2.

One who seeks to cancel a mortgage as obtained from him fraudulently and as having been fraudulently altered by mortgagee to include property not described therein when executed does not change his cause of action by amending his petition so as to charge that the mortgage is a forgery and a substitution for the mortgage read to him and which he was asked to sign. Lookabaugh v. Bowmaker, 96 P. 651, 21 Okl. 489.

[72] Cohee v. Turner & Wiggins, 132 P. 1082, 37 Okl. 778; Joines v. Combs, 132 P. 1115, 38 Okl. 380; Offutt v. Wagoner, 120 P. 1018, 30 Okl. 458; Herron v. M. Rumley Co., 116 P. 952, 29 Okl. 317; Trower v. Roberts, 120 P. 617, 30 Okl. 215; Alcorn v. Dennis, 105 P. 1012, 25 Okl. 135; Kuchler v. Weaver, 100 P. 915, 23 Okl. 420, 18 Ann. Cas. 462; Rogers v. Hodgson, 26 P. 732, 46 Kan. 276; Mitchell v. Ripley, 49 P. 153, 5 Kan. App. 818; Brokaw v. Bartley, 61 P. 320, 9 Kan. App. 318; Jantzen v. Emanuel German Baptist Church, 112 P. 1127, 27 Okl. 473, Ann. Cas. 1912C, 659; Underwood v. Fosha, 133 P. 866, 89 Kan. 768; Shawnee-Tecumseh Traction Co. v. Wollard, 153 P. 1189, 54 Okl. 432; Wetmore State Bank v. Courter, 155 P. 27, 97 Kan. 178; Scott v. King, 152 P. 653, 96 Kan. 561; Abmeyer v. German-American State Bank, 179 P. 368, 103 Kan. 356; Elliott v. Coggswell, 155 P. 1146, 56 Okl. 239.

The granting of permission to amend petition to ask for additional attorney's fees is within the sound discretion of the trial court. State v. Glass, 160 P. 1145, 99 Kan. 159.

of trial,[73] during trial,[74] or before or after judgment, in the furtherance of justice, where they do not change substantially the claim or defense, is in the discretion of the trial court.[75]

[73] McKee v. Jolly (Okl.) 178 P. 656; St. Louis & S. F. R. Co. v. Long, 137 P. 1156, 41 Okl. 177, Ann. Cas. 1915C, 432; Long v. Kansas City, M. & O. R. Co., 164 P. 175, 100 Kan. 361.

Allowance of amendment of pleading at opening of trial, setting forth element of damages from facts already pleaded, is not abuse of discretion, especially where court offered continuance to make preparation to meet new matter. Western Silo Co. v. Carter, 158 P. 71, 98 Kan. 279.

[74] Maston v. Glen Lumber Co. (Okl.) 163 P. 128; American Warehouse Co. v. Gordon, 139 P. 123, 41 Okl. 618; Jones v. Phœnix Ins. Co., 146 P. 354, 94 Kan. 235; Jones v. S. H. Kress & Co., 153 P. 655, 54 Okl. 194; McCullough v. S. J. Hayde Contracting Co., 109 P. 176, 82 Kan. 734.

In a proceeding to settle the priorities of judgment liens, where the creditor whose judgment was first rendered does not aver that a levy was made under his judgment within a year from its rendition, it is not an abuse of discretion to allow an amendment at the trial. Excelsior Mfg. Co. v. Boyle, 26 P. 408, 46 Kan. 202.

An application to make amendments to a petition after the evidence has been closed is addressed to the discretion of the court. Matson v. Chicago, R. I. & P. Ry. Co., 102 P. 254, 80 Kan. 272. The refusal of an application, after the evidence is closed, to amend a petition for the purpose of alleging an additional element of damages, was not an abuse of discretion, where plaintiff had knowledge of such facts when his petition was filed, and no reasonable excuse was given for not including them. Id.

[75] City of Shawnee v. Slankard, 116 P. 803, 29 Okl. 133; Merchants' & Planters' Ins. Co. v. Crane, 128 P. 260, 36 Okl. 160; Smith v. Rockett, 192 P. 691, 79 Okl. 244; Doty v. Shepard, 139 P. 1183, 92 Kan. 122, rehearing denied 141 P. 1013, 92 Kan. 1041; Keil v. Evans, 161 P. 639, 99 Kan. 273.

While court under Rev. Laws 1910, § 4790, may, before or after judgment, in furtherance of justice, amend any pleading to conform to proof, yet as a general rule the allowance of such amendments is in court's sound judicial discretion. Mackenzie v. City of Anadarko (Okl.) 178 P. 483.

Held not an abuse of discretion.—It is not an abuse of discretion to permit, after the close of the evidence, an amended petition to be filed which does not substantially change the cause of action or its defense. Midland Valley R. Co. v. Rippe, 61 Okl. 314, 161 P. 233.

It was not an abuse of discretion to permit the plaintiff in a divorce suit to amend his petition so as to allege adultery in addition to cruelty and gross neglect of duty. Penn v. Penn, 133 P. 207, 37 Okl. 650.

Where corporation is properly before court to answer petition naming it correctly, but wrongly alleging state of its incorporation, amendment to properly describe such corporation is justified. Bishop-Babcock-Becker Co. v. Hyde, 61 Okl. 250, 161 P. 172.

In an action for divorce and alimony, the refusal of leave to file a third amended plea three years after the first amended petition, which was filed when plaintiff knew all the facts as to the title to property sought to be

Amendments may be allowed to defeat a motion for judgment on the pleadings.[76]

An amendment of a petition, introducing a new and distinct cause of action, after the issues have been joined and the trial begun, is not permissible for the purpose of conforming the pleadings to the facts proved, as it would "change substantially" the claim of the plaintiff.[77]

Where the evidence to refute plaintiff's theory would sustain a judgment against defendant on a theory which might have been presented by plaintiff in another count, an amendment introducing such other theory ought to be allowed.[78]

Though ordinarily a pleading cannot be amended after verdict to conform to proof admitted over objection, an amendment may be allowed to prevent a final judgment against a party because of a defect in his pleading which has been supplied by evidence.[79]

reached, was not an abuse of the discretion of the trial court. Lake v. Winslow, 129 P. 863, 36 Okl. 679.

Where the petition, in an action for wrongful death, alleges that defendant committed acts amounting to wantonness, but characterized such acts simply as "negligence," it is not error to permit an amendment charging wanton misconduct in express terms, even after the limitation period has expired. Harbert v. Kansas City Elevated Ry. Co., 138 P. 641, 91 Kan. 605, 50 L. R. A. (N. S.) 850.

[76] Mires v. Hogan, 79 Okl. 233, 192 P. 811.

[77] State v. Krause, 50 P. 882, 58 Kan. 651.

Where plaintiff in ejectment alleged that he was the owner of the legal and equitable title, he does not allege a different cause of action in an amended petition, alleging that he was the owner of the legal title, but that the deed to him was executed as a mortgage, and that the condition has been broken. Maddin v. Robertson, 38 Okl. 526, 133 P. 1128.

Plaintiff, whose daughter was killed through the alleged negligence of defendants, brought an action in which he stated a common-law liability for loss of services of his daughter, but the averments were wholly insufficient to constitute a statutory liability for her death. More than two years after the negligent injury, he asked and obtained leave to amend his petition, so as to state a cause of action for the recovery of damages for death under Civ. Code, § 422. Held, that the amendment constituted a new cause of action which did not relate back to the commencement of the action, so that the cause of action set up in the amendment was barred by limitations. City of Kansas City v. Hart, 57 P. 938, 60 Kan. 684; Simpson v. Same, Id.

[78] Harn v. Patterson, 58 Okl. 694, 160 P. 924.

[79] Sutter v. International Harvester Co. of America, 106 P. 29, 81 Kan. 452.

In an action on a policy for the loss sustained by the destruction of the property insured, where the petition alleges the value of said property, and the jury find a verdict for a larger sum, it is error for the court, after ver-

Amendments should ordinarily be allowed on request therefor at the first opportunity after the necessity appears.[80]

The allowance or refusal of a belated amendment to pleadings is within the discretion of the trial court.[81]

Refusal to permit a party to amend after one trial had is not an abuse of the court's discretion;[82] but the allowance of an amendment after trial to conform the petition to the facts proved is equivalent to a finding of fact by the court, and the order will not be reversed on appeal because apparently against the weight of evidence, there being some evidence to support it.[83]

When a petition omits an averment necessary to show a right of action in plaintiff, and defendant at every opportunity throughout the trial objects to it, and to the reception of evidence under it because of such omission, it is too late, after verdict in plaintiff's favor and the filing of a motion for a new trial by defendant, to cure the defective petition by amending it to conform to the facts proved.[84]

An agreement between the parties as to the amount of recovery will support a judgment for such amount, though the pleadings were not amended to correspond with the agreement.[85]

dict, to allow plaintiff to amend his allegations of value so as to cover the amount of the verdict. Home Ins. Co. of New York v. Wagner, 57 P. 1049, 9 Kan. App. 93.

[80] Southwestern Broom & Warehouse Co. v. City Nat. Bank, 52 Okl. 422, 153 P. 204.

The allowing of an amendment after a full trial of a declaration seeking recovery of the entire amount due on a contract for the purchase of cattle and feed, so as to claim recovery for the portion shown to have been delivered should not be denied on the ground of surprise. Snyder v. Rosenbaum, 215 U. S. 261, 30 S. Ct. 73, 54 L. Ed. 186, affirming 18 Okl. 168, 89 P. 222.

[81] German-American State Bank v. Badders, 152 P. 651, 96 Kan. 533; State Bank of Eudora v. Brecheisen, 157 P. 259, 98 Kan. 193; Pittman & Harrison Co. v. Hayes, 157 P. 1193, 98 Kan. 273.

Where the petition has been once amended and there has been considerable delay before the case came to trial, and a demurrer is sustained to plaintiff's evidence, it is not an abuse of discretion to then refuse to permit plaintiff to amend by changing the cause of action from one to recover a forfeit from a stakeholder to one for damages for breach of contract. Benfield v. Croson, 136 P. 262, 90 Kan. 661.

[82] Atchison Sav. Bank v. Means, 58 P. 989, 61 Kan. 857; Cornelssen v. Harman, 103 Kan. 624, 176 P. 141.

[83] Missouri Pac. Ry. Co. v. McCally, 21 P. 574, 41 Kan. 639, 655.

[84] Walker v. O'Connell, 52 P. 894, 59 Kan. 306.

[85] Wilson v. Panne, 41 P. 984, 1 Kan. App. 721.

Allowance of amendment to answer after a motion to reopen case has been overruled, in order to plead new issues, is within trial court's discretion.[86]

Where defendant's answer admits a fact essential to plaintiff's right to recover, and after defendant has made his opening statement not inconsistent with such admission, and after motion for peremptory instruction against him, the court may in its discretion refuse to permit him to amend the answer by denying the facts admitted.[87]

It is not abuse of discretion to refuse, after impaneling of jury, to allow answer alleging personal contributory negligence to be amended so as to charge also imputed negligence.[88]

It is within the court's discretion to refuse permission to file a second amended answer.[89]

It is not an abuse of discretion to refuse during the trial of a cause an amendment to an answer which sets up a new defense, where no reason is given therefor other than that the trial court refused to allow the evidence to be introduced under a general denial.[90]

An answer cannot be amended to conform to the proof, where the proof supporting the amendment was immaterial, incompetent, and introduced over plaintiff's objection.[91]

Where a civil action is tried before a district judge without a jury, and special findings are made and filed by the judge, even if there be a variance between the allegations of the answer and the facts proven upon the trial, yet if it be a case where an amendment of the answer ought to have been allowed to conform to the facts proved, the judgment will not be reversed on account of such variance; but, instead thereof, the answer will be considered as amended to conform to the facts proved and found.[92]

[86] Randall v. Randall, 166 P. 516, 101 Kan. 341.

[87] First State Bank of Keota v. Bridges, 39 Okl. 355, 135 P. 378.

[88] Angell v. Chicago, R. I. & P. Ry. Co., 156 P. 763, 97 Kan. 688, rehearing denied 157 P. 1196, 98 Kan. 268.

[89] St. Francis Land & Abstract Co. v. Rathburn, 114 P. 862, 84 Kan. 664.

[90] Piper v. Choctaw Northern Townsite & Improvement Co., 85 P. 965, 16 Okl. 436.

[91] Northwest Thresher Co. v. McNinch, 140 P. 1170, 42 Okl. 155; Same v. Pruitt, 140 P. 1173, 42 Okl. 163; Same v. Bell, 140 P. 1174, 42 Okl. 164; Same v. Long, 141 P. 4, 42 Okl. 165; Same v. Washichek, 141 P. 4, 42 Okl. 166; Same v. Minium, 141 P. 5, 42 Okl. 168; Same v. Basey, 141 P. 5, 42 Okl. 169.

[92] Wilcox & White Organ Co. v. Lasley, 20 P. 228, 40 Kan. 521.

Imposition of terms on granting leave to amend is a matter resting in the sound discretion of the court.[93]

Permitting defendant to amend to allege mutual mistake of law, after the evidence was closed, witnesses were discharged, the jury instructed, and counsel for defendant had made his opening argument, plaintiff not being granted a continuance, is an abuse of the discretion vested in the court.[94]

It is no abuse of discretion to permit an amended reply, which does not change issues, to be filed before final judgment.[95]

It is error to allow a pleading to be amended in a material respect and render judgment thereon without notice to, and in the absence of, the adverse party.[96]

In order to take advantage of a ruling on a demurrer when such demurrer is sustained, the party must stand upon his pleading held to be defective, and not amend.[97]

MOTION FOR LEAVE TO AMEND PETITION

(Caption.)

Come now the plaintiffs and ask leave of court to amend their petition by interlineation or by attaching to the bottom of page ——— of said petition the following paragraph, to wit: (Here set forth amendments desired.)

Wherefore plaintiffs pray that they be permitted to amend said petition as above stated.

———, Attorneys for Plaintiffs.

ORDER ALLOWING AMENDMENT TO PETITION

(Caption.)

Now on this 4th day of September, 1917, this cause coming on for hearing on the motion of plaintiffs to amend the petition filed

[93] Pappe v. Post, 101 P. 1055, 23 Okl. 581.

[94] Northwest Thresher Co. v. McNinch, 140 P. 1170, 42 Okl. 155; Same v. Pruitt, 140 P. 1173, 42 Okl. 163; Same v. Bell, 140 P. 1174, 42 Okl. 164; Same v. Long, 141 P. 4, 42 Okl. 165; Same v. Washichek, 141 P. 4, 42 Okl. 166; Same v. Minium, 141 P. 5, 42 Okl. 168; Same v. Basey, 141 P. 5, 42 Okl. 169.

[95] Bly v. Pool, 60 Okl. 77, 159 P. 511.

[96] Kansas City, L. & S. R. Co. v. Richolson, 1 P. 138, 31 Kan. 28; Kansas City, L. & S. R. Co. v. Richolson, 1 P. 138, 31 Kan. 28.

[97] Berry v. Barton, 71 P. 1074, 12 Okl. 221, 66 L. R. A. 513.

herein, after due consideration the court finds that plaintiffs are entitled to amend said petition as stated in said motion.

It is therefore ordered and decreed that plaintiffs be and they are hereby given authority to amend their petition as stated in their motion, by (here set out amendments to be made).

Said amendments to be made not later than ———, and defendants given ——— days to file amended answer.

———, Judge.

§ 652. Variance

"No variance between the allegations, in a pleading, and the proof, is to be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled, and thereupon the court may order the pleading to be amended, upon such terms as may be just." [98]

Plaintiff before judgment may properly be permitted to amend his declaration to conform to the facts proved, where such amendment does not substantially change the cause of action.[99]

[98] Rev. Laws 1910, § 4784.

Giving of instruction to find for defendant if the evidence showed that the date of the conversion was different from that alleged in bill of particulars held error in view of Rev. Laws 1910, § 4784 et seq. Missouri, O. & G. Ry. Co. v. Diamond, 48 Okl. 424, 150 P. 175.

[99] Lookabaugh v. Bowmaker, 96 P. 651, 21 Okl. 489; Elwood Oil & Gas Co. v. Gano, 76 Okl. 287, 185 P. 443; Fitzgerald v. Hollan, 24 P. 957, 44 Kan. 499; Fulsom-Morris Coal & Mining Co. v. Mitchell, 132 P. 1103, 37 Okl. 575; Binion v. Lyle, 114 P. 618, 28 Okl. 430; St. Louis, I. M. & S. Ry. Co. v. Hardwick, 115 P. 471, 28 Okl. 577.

In action for amount due for drilling an oil well under an oral contract to pay $1.50 per foot, an amendment, alleging that defendant agreed to pay the customary price for drilling such well in the locality, which was $1.50 per foot, simply pleading more specifically the contract alleged to have been made did not contravene the rule against pleading a special contract and attempting a recovery upon a quantum meruit. Elwood Oil & Gas Co. v. Gano, 76 Okl. 287, 185 P. 443.

Amendment of pleading to correspond with the proof will not be reversed, where no prejudice is shown. Coley v. Johnson, 121 P. 271, 32 Okl. 102.

In an action for personal injuries, the plaintiff offered evidence as to the expenses incurred for medical attention, medicines, etc. This was objected to on the ground that such issue was not raised by the pleadings. The pleadings were then permitted to be so amended, when the evidence was ad-

Defendant may likewise be permitted to amend.[1]

"When the variance is not material, * * * the court may direct the fact to be found, according to the evidence, and may order an immediate amendment without cost." [2]

mitted. Held, not to be an abuse of discretion. Chas. T. Derr Const. Co. v. Gelruth, 120 P. 253, 29 Okl. 538.

Where a petition, intended to state a cause of action for false imprisonment, fails to do so, but sufficiently states a cause of action for malicious prosecution, and the evidence clearly shows false imprisonment, and the defendant is not misled, held, that the petition might be amended at any time during the trial so as to state a cause of action for false imprisonment. Atchison, T. & S. F. R. Co. v. Rice, 14 P. 229, 36 Kan. 593.

In action for agreed price of drilling an oil well, with counterclaim for plaintiff's negligence in destroying well, wherein defendant's pleading was not explicitly in conflict with the evidence, but was merely ambiguous and indefinite, and where plaintiff was not taken by surprise, an amendment should have been allowed. Gates v. Little Fay Oil Co., 105 Kan. 46, 181 P. 570.

Where petition alleged note's transfer to plaintiff in due course but copy of note showed no written indorsement, and where evidence of transfer by indorsement before maturity was received without objection, court, on objection to sufficiency of petition, should have allowed amendment to conform to proof. Stevens v. Vermillion, 102 Kan. 408, 170 P. 807.

A trial amendment in an action for recovery of rents due on farm land,

---

[1] Plaintiff commenced an action to recover judgment on three promissory notes. The defendants pleaded, in substance, a failure of consideration, and asked that the notes be canceled. After the evidence was closed, defendants were permitted to amend their answer by an averment that six other promissory notes were given with those mentioned in the petition, for the same purpose, and as a part of the same transaction, and praying that they be canceled also. Held not error to permit such amendment; it clearly appearing from the undisputed evidence given in the case that such averments were true. Minneapolis Threshing Mach. Co. v. Currey, 89 P. 688, 75 Kan. 365.

Where the answer, in an action for damages from eating tainted meat, admitted that plaintiff was employed by the "defendants," and the uncontradicted evidence showed that he was employed by only one, defendants should have been permitted to amend their answer to conform to the proof. Malone v. Jones, 139 P. 387, 91 Kan. 815, L. R. A. 1915A, 328, rehearing granted 139 P. 1199, and judgment affirmed on rehearing 142 P. 274, 92 Kan. 708, L. R. A. 1915A, 331.

Where, in an action for conversion, the answer was a general denial, and evidence tending to show purchase and payment was excluded because not within the issues, an application for permission to amend to plead purchase and payment was improperly denied. American Warehouse Co. v. Gordon, 139 P. 123, 41 Okl. 618.

[2] Rev. Laws 1910, § 4785.

Where a petition on a fire policy alleges a written settlement, oral proof of a parol settlement is not a total failure of proof within Comp. Laws 1909, § 5675, but a variance within sections 5673 and 5674, permitting amendments. Merchants' & Planters' Ins. Co. v. Crane, 128 P. 260, 36 Okl. 160.

§ 653. —— Failure of proof

"When, however, the allegation of the claim or defense, to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, * * * but a failure of proof." [3]

§ 654. Amendment on demurrer

"At any time within ten days after the demurrer is filed, the adverse party may amend, of course, on payment of costs since filing

which was in the furtherance of justice to conform allegation to proof, is properly allowed, particularly where not excepted to. Pruitt v. Carter, 52 Okl. 284, 152 P. 1081.

In an action on a fire insurance policy, where, after several months' default, defendant, on leave of court, files an answer, on which trial is had nearly two years after the loss, and while plaintiff's testimony is being taken defendant asks leave to amend its answer and introduce a new defense, but makes no showing as to the truth of such defense, nor explains its delay, such leave may be properly refused. Kansas Farmers' Mut. Fire Ins. Co. v. Amick, 14 P. 454, 37 Kan. 73.

Where, on foreclosure of subcontractors' liens, it appeared that the contractor was really the owners' agent, the court properly permitted amendments to the petition to conform to such proof. Southwestern Paint & Wall Paper Co. v. Perkins, 136 P. 324, 90 Kan. 725.

Where plaintiff in replevin alleged ownership and right of possession under a chattel mortgage and the court found that plaintiff had the right of possession, though not under the chattel mortgage, held that plaintiff's motion to amend its petition, under Gen. St. 1909, § 5733 (Code Civ. Proc. § 140), to conform to the evidence, and for judgment, should have been sustained. Phillips County Bank v. Lowe, 137 P. 930, 91 Kan. 338.

In an action to foreclose a mortgage in which a defendant claimed that the mortgage was part of the assets of a partnership composed of himself and plaintiff, and the evidence showed that the owner was an innocent purchaser who had given a mortgage to such defendant, and that such defendant was not entitled to the mortgage, an amendment to conform the petition to such situation and to pray that plaintiff be subrogated to such defendant's rights in the mortgage was properly allowed after judgment. Winfrey v. Clapp, 122 P. 1055, 86 Kan. 887.

When a petition claiming damages is not demurrable for insufficiency in its statements of fact to constitute a cause of action, but is only subject to a motion to make it more definite and certain as to the allegations of damage sustained, and upon it a first trial is had, in the course of which the plaintiff makes a full disclosure of the several items constituting his demand, it is not error upon a second trial, and at the close of the plaintiff's evidence, during which the same disclosures were made, to allow the petition to be amended by setting out the various items of damages claimed so as to conform to the evidence given. Walker v. O'Connell, 52 P. 894, 59 Kan. 306, distinguished. Tullock v. Mulvane, 60 P. 749, 61 Kan. 650, judgment reversed 22 S. Ct. 372, 184 U. S. 497, 46 L. Ed. 657.

[3] Rev. Laws 1910, § 4786.

the defective pleading. Notice of the filing of an amended pleading shall be forthwith served upon the other party or his attorney, who shall have the same time thereafter to answer or reply thereto, as to an original pleading." [4]

"Upon a demurrer being overruled the party who demurred may answer or reply, if the court be satisfied that he has a meritorious claim or defense, and did not demur for delay." [5]

"If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court, in its discretion, shall direct." [6]

§ 655. Continuance after amendment

"When either party shall amend any pleading or proceeding, and the court shall be satisfied, by affidavit or otherwise, that the adverse party could not be ready for trial, in consequence thereof, a continuance may be granted to some day in term, or to another term of the court." [7]

§ 656. Notice of amendment

Where the filing of an amended petition is an abandonment of the original petition and sets out a new cause of action, and seeks relief not prayed for in the original petition, notice to defendant or his attorney is essential to give the court jurisdiction to render judgment thereon.[8]

[4] Rev. Laws 1910, § 4788.

Under Comp. Laws 1909, § 5677 (St. 1893, § 4015), providing that at any time within 10 days after a demurrer is filed the adverse party may amend of course on payment of costs accrued since filing the defective pleading, and Comp. Laws 1909, § 5679 (St. 1893, § 4017), authorizing the court, on such terms as may be proper, to amend any pleading, when the amendment does not substantially change the claim on defense, the court is not only authorized to permit an amendment, but may require the payment of accrued costs as a condition thereto. Herron v. M. Rumsley Co., 116 P. 952, 29 Okl. 317.

[5] Rev. Laws 1910, § 4789.

[6] Rev. Laws 1910, § 4792.

[7] Rev. Laws 1910, § 4793.

[8] Lausten v. Lausten, 55 Okl. 518, 154 P. 1182.

§ 657. Interlineation

It is not error to permit amendment of petition by interlineation, where it does not substantially change plaintiff's claim and no apparent prejudice results to defendant.[9]

§ 658. Subject-matter of amendment

Amendments of pleadings may be allowed in furtherance of justice, when they do not substantially change cause of action or defense, regardless of change in form of remedy.[10]

An amended pleading containing a definite statement of facts concerning a material matter not in conflict with the general averment respecting the same subject contained in the original petition does not state a new cause of action, but is only an amplification of the facts constituting the first one pleaded.[11]

A petition which fails to state a cause of action may be amended, though some of the defendants reside outside the county and are attacking the court's jurisdiction.[12]

It is not error to permit an amendment which pleads an additional cause of action growing out of the same transaction, but does not substantially change the claim.[13]

Whether the cause of action sued on originally is the same as

[9] McKee v. Jolly (Okl.) 178 P. 656.

Under Civ. Code Kan. § 140 (Gen. St. Kan. 1915, § 7032), granting permission to amend petition during trial by interlineation, increasing sum sued for, where defendant objected, but requested no delay, and proceeded with trial, has been held no error. Ring v. Phœnix Assur. Co., Limited, of London, 164 P. 303, 100 Kan. 341.

[10] E. Van Winkle Gin & Machine Works v. Brooks, 53 Okl. 411, 156 P. 1152.

Plaintiffs sued defendant for damages for false representations in the sale to them by him of a horse. At the trial, after all the evidence had been introduced, but before argument, the court gave plaintiffs leave to amend the petition, and granted a continuance, imposing on plaintiffs all the costs up to the time of the amendment. The amended petition alleged that defendant expressly warranted the horse. Held, that allowing the amendment was not error, under Civ. Code, § 139, providing that the court may allow an amendment "in furtherance of justice, and on such terms as may be proper," when the amendment does "not change substantially the claim or defense." Culp v. Steere, 28 P. 987, 47 Kan. 746.

[11] Wilbers v. Ronnau, 107 P. 772, 82 Kan. 171.

[12] Wells v. Hansen, 154 P. 1033, 97 Kan. 305, L. R. A. 1916F, 566, Ann. Cas. 1918D, 230.

[13] St. Louis & S. F. Ry. Co. v. Keiffer, 48 Okl. 434, 150 P. 1026.

that set out in an amended petition is to be determined by the averments of the pleadings, and not by testimony of what the pleader intended the pleadings should contain.[14]

Amendments to correct mistakes or defects in pleadings should be liberally allowed, where they will promote justice and not substantially change the claims or defenses.[15] But an application to amend a petition made when the case is called for trial may be properly denied where the materiality of the proposed amendments is not made to appear, nor the reasonable necessity thereof.[16]

Where personal service is made on one defendant, and another, against whom no personal judgment is asked, is served by publication, and the latter makes a general appearance, it is proper to allow the original petition to be amended so as to charge such defendant personally.[17]

The filing of a complete amended petition after service or attempted service and before answer, is an abandonment of the original petition.[18]

Where an amended petition is filed, and no part of the original petition is referred to or adopted therein, such original petition is superseded and is no part of the record, and while it may be introduced in evidence by the adverse party the same as any other writing signed by the party, subject to be explained, its contents cannot be considered on the trial either as part of the record or as admissions of plaintiff, unless introduced in evidence.[19]

Plaintiff may amend his petition at any time before answer is filed to increase his demand for relief,[20] or by reducing claim for

[14] City of Kansas City v. Hart, 57 P. 938, 60 Kan. 684; Simpson v. Same, Id.

[15] Woods v. Nicholas, 140 P. 862, 92 Kan. 258.

[16] Federal Betterment Co. v. Reeves, 93 P. 627, 77 Kan. 111, 15 Ann. Cas. 796.

[17] Beebe v. Carter, 38 P. 278, 54 Kan. 261.

[18] Lausten v. Lausten, 55 Okl. 518, 154 P. 1182.

The filing of an amended pleading takes from the record the original pleading. Brown v. Galena Mining & Smelting Co., 4 P. 1013, 32 Kan. 528.

[19] Lane v. Choctaw, O. & G. R. Co., 91 P. 883, 19 Okl. 324; Territory v. Woolsey, 130 P. 934, 35 Okl. 545; Gaar, Scott & Co. v. Rogers, 46 Okl. 67, 148 P. 161.

[20] Willis v. Cochran (Okl.) 168 P. 658.

In an action against a prior guardian and his sureties, plaintiff praying for the amount of the bond, he was entitled to amend to conform to evidence

damages,[21] or by striking out a claim for judgment against one of the defendants.[22]

The right to amend a petition by increasing ad damnum and joining a party plaintiff is absolute, and it is reversible error to strike such an amended petition from the files.[23]

Amendments which substantially change the claim previously relied on will not be permitted.[24]

One who seeks to rescind a contract for the exchange of land, by an action in the county in which the land is situated, against persons who reside elsewhere, cannot, after they have been summoned and appear, amend his petition by adding a second cause of action for damages for breach of covenant of warranty and thus blend a local with a transitory cause of action, but must be confined to the cause of action that authorizes the service made.[25]

The amendment of a petition by striking out certain words from the title of plaintiff, and making the same amendment in the petition, does not change substantially the cause of action, and will relate back to the date of the original petition.[26]

The rule permitting amendments permits amendment of an exhibit to a pleading,[27] of the reference in the pleading to the ex-

supporting a finding for a larger sum found to be due. Charles v. Witt, 129 P. 140, 88 Kan. 484.

Plaintiffs alleged that defendants engaged to sell plaintiffs' land at $4,000 for a commission of $125, but that if only $3,900 could be obtained, the commission should be $100. The land sold for $4,000, but defendants fraudulently represented that only $3,900 was obtained, that plaintiffs paid the defendants a commission of $100, and that they fraudulently converted $100 of the price paid for the land, and asked judgment for $75. Later plaintiffs were permitted to amend their petition by alleging that defendants through their fraud forfeited all rights to commission, and asked for recovery of commission paid and the remainder of the price. Held, that the amendment was properly allowed. Deter v. Jackson, 92 P. 546, 76 Kan. 568.

[21] Lusk v. Phelps (Okl.) 175 P. 756.

[22] Mulvane v. Sedgley, 61 P. 971, 10 Kan. App. 574, judgment affirmed 64 P. 1038, 63 Kan. 105, 55 L. R. A. 552.

[23] Willis v. Cochran (Okl.) 168 P. 658.

[24] Jewett v. Malott, 57 P. 100, 60 Kan. 509.

[25] Neal v. Reynolds, 16 P. 785, 38 Kan. 432.

[26] American Bonding Co. of Baltimore v. Dickey, 88 P. 66, 74 Kan. 791.

[27] Where it appeared at trial that there was some slight variation between original mortgage and copy attached to plaintiff's petition, amendment by attaching correct copy as exhibit was permitted by Rev. Laws 1910, § 4784. Chase v. Cable Co. (Okl.) 170 P. 1172.

hibit,[28] of words descriptive of plaintiff,[29] of the description of the property involved in the suit,[30] and of the name of the court and the county in the caption to the petition where the summons was properly entitled.[31] An amendment may be allowed in amplification of plaintiff's claim.[32]

An amendment of a petition to correct a mistake of the pleader, which merely substitutes one party for another as plaintiff, does not change the cause of action.[33]

In a mother's action for death of a minor son, an amendment

[28] Where a petition on a note recited that a copy of the note was attached, marked "Exhibit A," but by mistake the original note instead of a copy was attached, plaintiff after answer was entitled to amend by striking the reference to a copy and inserting a recital that the original note was attached. Bradley v. Pinney, 93 P. 585, 77 Kan. 763.

[29] Where words descriptive of plaintiff are by mistake used in the title of the action, and an allegation is also by mistake inserted in the petition, averring that such plaintiff is a corporation, the petition may be amended. American Bonding Co. of Baltimore v. Dickey, 88 P. 66, 74 Kan. 791.

[30] Where a suit is brought to recover the purchase price of a possessory right to and improvements upon a claim on which plaintiff held the homestead entry, it is proper for the court to allow an amendment to the petition changing the description of the land from the S. W. ¼ of section No. 23, to the S. W. ¼ of section No. 25. Lookabaugh v. La Vance, 49 P. 65, 6 Okl. 358.

In an action brought for a conversion of certain cattle, and in the trial of which it appears that the defendant did not in fact sell the cattle in question, but that they were sold by another under the direction of defendant, who knowingly received the proceeds of sale, and converted the same, it is not error for the district court, before another trial of the cause is had, to permit the plaintiff to so amend his petition as to charge defendant with a conversion of the proceeds of such sale. Emporia Nat. Bank v. Layfeth, 64 P. 973, 63 Kan. 17.

[31] A petition did not in its caption recite the name of the court and county in which the action was brought, as required by Code Civ. Proc. § 87. A præcipe for summons, properly entitled, was filed and the summons in due form was served. Held, that the court had jurisdiction of the action and of the parties, and properly allowed the petition to be amended by inserting the name of the court and the county. Hastie v. Burrage, 77 P. 268, 69 Kan. 560.

[32] Amendment to a petition in an action for defendant's fraudulent representations as to the value of notes exchanged by him for plaintiff's property merely amplifies the averments of the original petition and states a cause of action for deceit and fraud. Woods v. Nicholas, 140 P. 862, 92 Kan. 258.

Where an amended petition does not substantially change plaintiff's original claim, it is not error to permit it to be filed, though it sets out the original claim more in detail. West & Russell v. Rawdon, 130 P. 1160, 33 Okl. 399.

[33] Harlan v. Loomis, 140 P. 845, 92 Kan. 398.

permitting the adding of the brothers and sisters as plaintiffs does not change the cause of action.[34]

Where cause of action did not exist at the time of filing a petition, it cannot be aided by an allegation in an amended petition of an occurrence subsequent to the filing of the original petition.[35]

An amendment, changing an action on a promissory note into an action on an implied trust, will not be permitted.[36]

That a fifth amended petition sets up a different cause from the fourth does not render erroneous its allowance, where it does not set up a cause different from that in the petitions prior to the fourth.[37]

In an action for slander, it is not error to permit filing of amendment charging the utterance of other slanderous words from those alleged, where the new cause of action is of the same general character as that contained in the original petition, and where defendant has ample time to meet such amendment; it not substantially changing the cause of action.[38]

It is not error to permit a petition in a suit to quiet title to be amended before answer, so as to change the action to one in ejectment, where no prejudice is shown.[39]

An amendment in ejectment may be properly allowed to unite a cause of action for partition.[40]

In an action for material furnished and services rendered for the recovery of the contract price, it is proper to permit plaintiff to amend his petition, stating no new facts constituting a cause of action, but seeking to recover the value of the material and work upon a quantum meruit.[41]

[34] Motsenbocker v. Shawnee Gas & Electric Co., 49 Okl. 304, 152 P. 82, L. R. A. 1916B, 910.

[35] Brown v. Galena Mining & Smelting Co., 4 P. 1013, 32 Kan. 528.

[36] Jewett v. Malott, 57 P. 100, 60 Kan. 509.

[37] Ray v. Navarre, 47 Okl. 438, 147 P. 1019.

[38] Trower v. Roberts, 30 Okl. 215, 120 P. 617.

[39] Curtis v. Schmehr, 76 P. 434, 69 Kan. 124.

Where the petition in an action for partition shows the defendant to be in the exclusive occupancy of the premises involved, the court of the county to which the case is transferred on change of venue may permit it to be amended so as to state also a cause of action in ejectment. Young v. McWilliams, 89 P. 12, 75 Kan. 243.

[40] Hanson v. Hanson, 122 P. 100, 86 Kan. 622.

[41] Limerick v. Lee, 87 P. 859, 17 Okl. 165.

A petition for money had and received may be amended by stating that "defendant wrongfully, knowingly, fraudulently, and unlawfully appropriated and converted the money to his own use," without changing the nature of the action, when it is evident that the amended petition is concerning the same transaction set forth in the original one.[42]

The petition in action by a copartnership to recover for conversion of its property cannot be amended, so as to state a cause of action in favor of one of the members of the dissolved firm for an accounting of the partnership business between such member and such defendant.[43]

Filing an amended petition by leave waives all error in the proceedings prior thereto.[44]

When a demurrer to a petition has been overruled, and the defendant answers, and the plaintiff is then permitted to amend the petition, and to this amended petition the defendant answers, and after a trial is had on the amended pleadings, the defendant brings the case up for review, the appellate court will not consider the sufficiency of the original petition.[45]

Where an amendment allowed after trial does not substantially change the issues, and there is no showing of surprise,[46] or where the court permits plaintiff to amend her petition by simply increasing the amount of damages asked for, it is not error to refuse to allow a defendant time to file an amended answer.[47]

Where defendant has knowledge of misjoinder before trial, he cannot after trial, amend his answer, so as to allege such misjoinder.[48]

[42] Bogle v. Gordon, 17 P. 857, 39 Kan. 31.

[43] Thompson v. Beeler, 77 P. 100, 69 Kan. 462.

[44] Garanflo v. Cooley, 5 P. 766, 33 Kan. 137; Long v. Hubbard, 50 P. 968, 6 Kan. App. 878. An amended petition becomes and must be treated as the original petition. A summons, order of arrest, and subsequent judgment must be considered the same as if the amended petition had been filed at the time the original petition was filed. Id.

[45] Union Pac. Ry. Co. v. Estes, 15 P. 157, 37 Kan. 229.

[46] Dixon v. Helena Society of Free Methodist Church of North America (Okl.) 166 P. 114.

[47] City of Topeka v. Sherwood, 18 P. 933, 39 Kan. 690.

[48] Where plaintiffs sued on a policy covering real and personal property, and the trial showed that one had no interest in the personalty and the

An answer, defective for failure to allege failure of warranty, is cured when amended during trial by inserting the omitted allegations.[49]

It is not error for the court, in an action on a note, to refuse to allow defendant to amend his answer by adding a new defense after the cause has been partly tried.[50]

An answer may be amended where the amendment does not substantially change the defense.[51]

Where issues have been joined, and plaintiff has filed an amended petition by leave of court, which does not change the cause of action, it is not error to refuse defendant leave to file an amended answer, where he can prove all the defenses under his original answer.[52]

It is not error to deny an application to amend the answer during trial, where the proposed amendment is inconsistent with the allegations of the answer.[53]

Defendants may be permitted to amend their answer by pleading more fully failure of consideration, which they had imperfectly pleaded.[54]

Refusal of amendment to answer to permit introduction of evidence establishing custom contravening written contract sued on is not error.[55]

A pleading may generally be amended by the addition of matters arising or discovered after the original pleading was filed.[56]

A party ought not to be permitted, after having selected his

other no interest in the real estate, which the insurance company knew before the action was brought, an application after the evidence had all been introduced by defendant to amend its answer and plead misjoinder was properly denied. Phenix Ins. Co. v. Washington, 81 P. 461, 71 Kan. 777.

[49] Barber Medicine Co. v. Bradley, 48 Okl. 82, 150 P. 127.

[50] Russell v. Gregg, 30 P. 185, 49 Kan. 89.

[51] Robertson v. Lombard Liquidation Co., 85 P. 528, 73 Kan. 779.

[52] Cherokee & P. Coal & Mining Co. v. Britton, 45 P. 100, 3 Kan. App. 292.

[53] Engle v. Legg, 39 Okl. 475, 135 P. 1058.

[54] Campbell v. Newton & Driskill, 52 Okl. 518, 152 P. 841.

[55] Drennan v. Warburton, 122 P. 179, 33 Okl. 561.

[56] In an action on a nonnegotiable note, refusal to permit defendant to amend his pleadings, so as to show that the collection of the note has been enjoined in a suit between the original parties, is reversible error. Randolph v. Hudson, 74 P. 946, 12 Okl. 516.

ground of defense, when he finds himself defeated thereon, to shift it, so as to court the hazard of another battle.[57]

In view of Rev. Laws 1910, § 4790, precluding defendant from amending to change his defense, it is not the duty of trial court to consider the answer as amended to conform to proof.[58]

In an action for damages, an amendment of defendant's answer by incorporating therein a general denial in addition to the matter formerly set up as a defense does not change substantially such defense, where the former answer did not contain a specific admission of the amount of damages claimed in plaintiff's petition.[59]

In a suit on a contract for the sale of land, the purchaser having pleaded that the contract was induced by fraud and had been rescinded therefor, it is not an abuse of discretion to allow the purchaser, on paying the costs and submitting to a continuance, to amend his answer so as to affirm the contract and claim damages for the fraud.[60]

An amended answer and cross-petition, filed in an action by the defendant, supersedes the first answer; and the plaintiff is precluded from insisting that the defenses set up in the original answer and cross-petition are inconsistent with each other.[61]

A demurrer to an amended answer does not raise the question whether the pleader had a right to make the amendment.[62]

After an amended answer has twice been held good when attacked by the plaintiff, it is error to refuse defendant leave to amend after the demurrer to his amended answer had been sustained.[63]

Where a cross-complaint is filed by defendant he is entitled to the same rights as plaintiff, so far as amending his pleading is concerned.[64]

[57] Barrett v. Kansas & T. Coal Co., 79 P. 150, 70 Kan. 649.

The granting or refusal of permission to amend is within trial court's discretion, which is not abused by refusal to permit trial amendment to answer substantially changing the defense. Dill v. Malot (Okl.) 167 P. 219.

[58] Springfield Fire & Marine Ins. Co. v. Griffin, 64 Okl. 131, 166 P. 431.

[59] Smock v. Carter, 50 P. 262, 6 Okl. 300.

[60] Stevens v. Matthewson, 26 P. 38, 45 Kan. 594.

[61] Reihl v. Likowski, 6 P. 886, 33 Kan. 515.

[62] Tecumseh State Bank v. Maddox, 46 P. 563, 4 Okl. 583.

[63] Leitz v. Rayner, 15 P. 571, 37 Kan. 470.

[64] Venable v. Dutch, 15 P. 520, 37 Kan. 515, 1 Am. St. Rep. 260.

Where a cross-petition alleged that by written contract plaintiff was to pay for certain party walls, it was not error to permit an amendment at the

After a trial, a reply should not be permitted to be amended, except in the interests of justice.[65]

The fact that a petition is not subscribed by the party or his attorney is a technical defect, which may be corrected by amendment.[66]

Where amended petition recites that all allegations of original petition are made a part thereof, demurrer is properly overruled, if facts stated in either or both pleadings constitute cause of action.[67]

When it is important that an answer should be verified, the court should allow it to be done by the affidavit of the defendant, his agent or attorney, even during the trial, under such terms as are proper.[68]

Where an unverified answer denying the execution of a note was not questioned by either party throughout the trial, an amendment by adding a verification may be allowed in furtherance of justice before or after judgment.[69]

trial alleging that the plaintiff agreed to pay for the party walls, but that by mutual mistake the written contract did not express the real agreement, and praying for its reformation. Gross Const. Co. v. Hales, 129 P. 28, 37 Okl. 131. Where a cross-petition alleged that by written contract plaintiff agreed to pay for party walls, an amendment, alleging that plaintiff agreed to pay for the party walls, but that by mistake the written contract did not express the real agreement, did not change substantially the claim or defense. Id.

[65] In an action for the wrongful seizure and conversion of personal property, the defendant, a United States marshal, attempted to justify under an order of attachment directed to him. Subsequent to the filing of the reply in the case the court, granting the order of attachment, upon motion discharged the attachment proceedings. Thereafter the plaintiff, with leave of the court, filed an amended or supplemental reply, setting up the dissolution of the attachment. Held, that the court committed no error in allowing the reply to be filed, as it alleged facts material to the case occurring after the former reply. Simpson v. Voss, 1 P. 601, 31 Kan. 227.

In an action on a note, the defense was failure of consideration. After a verdict against plaintiff was returned by the jury, and after their motion for a new trial was overruled, plaintiffs asked leave to amend their replies to the separate answers of defendants, in order to allege that the said defense had been waived by defendants. Held, that the request to amend came too late, and was properly overruled. Dunham v. Brown, 58 P. 232, 9 Kan. App. 889.

[66] Manspeaker v. Bank of Topeka, 46 P. 1012, 4 Kan. App. 768.

[67] Dashiell v. McGuire, 157 P. 409, 98 Kan. 177.

[68] Chinberg v. Gale Sulky Harrow Mfg. Co., 16 P. 462, 38 Kan. 228.

[69] Jones v. Citizens' State Bank, 39 Okl. 393, 135 P. 373.

Where an answer is filed purporting to be defendant's answer, but entirely unsigned, and the case is tried as if the answer had been signed, and the court's attention is not called to such defect until after judgment, the answer may then be amended by adding the signature.[70]

A court may, on objection made at the trial to an unverified interplea, permit its verification.[71]

Generally, the same rules will apply to the amendment of bills of particulars, on appeal from a justice to the district court, as those in reference to the amendment of pleadings in general.[72]

On appeal from a justice, the district court may, in the furtherance of justice, after evidence submitted, permit plaintiff, on payment of all costs, to amend his bill of particulars so as to show that he is seeking to recover as an administrator, and not as an individual.[73]

Permitting a plaintiff to amend the bill of particulars the second time, so as to charge defendant as a copartnership instead of a cor-

[70] Yurann v. Hamilton, 108 P. 822, 82 Kan. 528.

[71] Hargrove v. Woolf, 8 P. 192, 34 Kan. 101.

[72] Where a bill of particulars alleged that defendant contracted to take good care of the horse and colt of plaintiff entrusted to his keeping, it will be held that such pleading states a contract for ordinary care, and, where said bill of particulars further states that said horse and colt sickened and died for want of proper care and attention, it is error to admit evidence over the objection of defendant of a contract for special and extra care. Ransom v. Getty, 14 P. 487, 37 Kan. 75.

A written claim presented to a railway company, accompanied by a letter explaining the full particulars of the transaction, charging the company with the loss of 50 per cent. of a certain number of boxes of oranges, and for the return of freight paid it thereon, is sufficient to notify the company of a claim against it for damages caused by its negligence in transporting the oranges; and hence such claim, after being filed before a justice of the peace as a bill of particulars, could be amended by setting out the damages and negligence. St. Louis & S. F. Ry. Co. v. Bryan Fruit Co., 42 P. 267, 1 Kan. App. 551.

Where the bill of particulars in an action against a railroad company for a fire set by a locomotive shows that the company on a designated date ran a passenger train from one station to another so negligently as to permit fire to escape from the engine and destroy plaintiff's property, a motion to require the setting forth the number of the engine was properly refused, there being nothing to indicate that the company was operating so many passenger trains as to make it difficult to ascertain from the statement the particular engine. Missouri, K. & T. Ry. Co. v. Traxon, 92 P. 580, 77 Kan. 821.

[73] Reed v. Cooper, 1 P. 822, 30 Kan. 574.

poration as originally alleged, being within the discretion of the trial court, is not ground of reversal.[74]

A bill of particulars on two promissory notes may be amended so as to show the cause of action to be on a judgment rendered on such notes.[75]

§ 659. Supplemental pleadings

"Either party may be allowed, on notice, and on such terms, as to costs, as the court may prescribe, to file a supplemental petition, answer or reply, alleging facts material to the case, occurring after the former petition, answer or reply." [76]

It is the function of a supplemental petition to supply the facts which may be necessary to a complete determination of the rights of plaintiff and defendant touching the subject-matter of the suit, on the facts existing at the time of the rendition of the judgment, and which would vary the relief to which plaintiff would have been entitled at the commencement of the action.[77]

The filing of an amendatory or supplemental pleading rests in the discretion of the trial court, and must be on notice.[78]

A plaintiff, with the consent of the court, may file a supplemental petition, alleging facts material to the case occurring after the filing of his original petition.[79]

Where the application is made after several trials of the action and the facts constituting the new defense are not fully and definitely stated, and no satisfactory reason is given for the delay in presenting the application, its refusal is not error.[80]

Where a petition for unlawful conversion fails to state definitely the date of such conversion, and a motion by defendant to compel

[74] Farmers' & Merchants' Bank v. Bank of Glen Elder, 26 P. 680, 46 Kan. 376.

[75] Teberg v. Swenson, 4 P. 83, 32 Kan. 224.

[76] Rev. Laws 1910, § 4795; Prince v. Gosnell, 47 Okl. 570, 149 P. 1162.

[77] Wade v. Gould, 59 P. 11, 8 Okl. 690.

[78] Brokaw v. Bartley, 61 P. 320, 9 Kan. App. 318; Kingfisher Improvement Co. v. Talley, 51 Okl. 226, 151 P. 873; Alexander v. Clarkson, 150 P. 576, 96 Kan. 174; Rogers v. Hodgson, 26 P. 732, 46 Kan. 276; Goodacre v. Skinner, 28 P. 705, 47 Kan. 575; Wade v. Gould, 59 P. 11, 8 Okl. 690; Stith v. Fullinwider, 19 P. 314, 40 Kan. 73; Alexander v. Clarkson, 150 P. 576, 96 Kan. 174.

[79] Williams v. Moorehead, 7 P. 226, 33 Kan. 609.

[80] Central Branch Union Pac. R. Co. v. Andrews, 21 P. 276, 41 Kan. 370.

plaintiff to give the exact date is overruled, and both parties try the case as though the statute of limitations were involved, it is error to refuse to permit defendant, at the close of plaintiff's testimony, to file a supplemental answer raising question of limitations.[81]

A plaintiff cannot file a supplemental petition after a judgment determining in his favor the issues presented by his original petition, where the purpose of such supplemental petition is merely to join a new party as codefendant in the original action upon facts arising since the commencement of the action and not growing out of issues involved therein and presenting matters distinct from any issue in the original action.[82] The facts embodied in a supplemental petition must relate to the cause of action set forth in the original petition and be in aid thereof.[83] A supplemental petition cannot set out facts which have arisen since the commencement of the action and which by themselves constitute a new and independent cause of action without reference to the facts alleged in the original pleading.[84]

Where the petition states no cause of action, the statute does not authorize the filing of a supplemental petition setting up subsequently occurring facts.[85] A defect in the original petition in that it states a cause of action not existing when the action was brought cannot be cured by setting up in a supplemental petition matters subsequently occurring.[86]

It is no objection to a supplemental answer and cross-petition that it alleges matters which have arisen, or have become known, subsequent to the filing of the original answer, if the facts are material.[87]

In a suit to cancel a deed, plaintiff's application, at the close of the testimony, to file a supplemental reply, alleging that the deed

81 Ament v. Lowenthall, 35 P. 804, 52 Kan. 706; Austin v. Jones, 28 P. 621, 47 Kan. 565.

82 National Bank of Anadarko v. First Nat. Bank, 39 Okl. 225, 134 P. 866.

83 Id.

84 Id.

85 Reader v. Farriss, 49 Okl. 459, 153 P. 678, L. R. A. 1916D, 672; Farriss v. Reader, 49 Okl. 492, 153 P. 682.

86 Id; Gardner v. City of Leavenworth, 146 P. 1000, 94 Kan. 509.

87 Atkinson v. Kirkpatrick, 135 P. 579, 90 Kan. 515; Robertson v. Christenson, 135 P. 567, 90 Kan. 555.

had been obtained by fraud, is properly denied, where the evidence does not support such allegation.[88]

A demurrer to a supplemental petition runs to the allegations of both the original and supplemental petitions.[89]

A petition pleading a specific title as the foundation for relief is not enlarged by an amended answer which, besides pleading specific defenses, states in general terms that the plaintiff has no title, and in order to secure the benefit of a new title acquired subsequent to the institution of the suit the plaintiff should obtain leave to file a supplemental petition setting up such title.[90]

§ 660. Lost pleadings

"If an original pleading be lost, or withheld by any person, the court may allow a copy thereof to be substituted." [91]

ARTICLE IX

DEFECTS AND OBJECTIONS

Sections

661. Immaterial errors.
662. Cure of error.
663. Waiver.
664. Objection to introduction of any evidence—Form.

§ 661. Immaterial errors

"The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." [92]

§ 662. Cure of error

Omission of material allegations in a petition or complaint may be supplied by the allegations of the answer.[93]

[88] Lewis v. Allen, 142 P. 384, 42 Okl. 584.

[89] Reynolds v. Hill, 114 P. 1108, 28 Okl. 533.

[90] Robertson v. Board of Com'rs of Rawlins County, 113 P. 413, 84 Kan. 52, judgment affirmed on rehearing 119 P. 316, 86 Kan. 10.

[91] Rev. Laws 1910, § 4783.

[92] Rev. Laws 1910, § 4791; Blackwell v. Hatch, 73 P. 933, 13 Okl. 169.

[93] Loyal Mystic Legion of America v. Brewer, 90 P. 247, 75 Kan. 729; St. Louis & S. F. R. Co. v. Keller, 62 P. 905, 10 Kan. App. 480.

Where the holder of a note and mortgage brings suit to foreclose, making the mortgagees and others defendants, and states as to such others that the

Where the allegations of an answer explicitly set forth matters defectively set forth in the petition, such defects in the petition are cured.[94]

The objection that the petition of plaintiff contained two causes of action which were not separately stated and numbered, one being to reform a deed, became immaterial when the defendant in his pleading and proof showed that the mistake in that deed had been cured by the making and delivery of a subsequent deed.[95]

Defects in the petition caused from incomplete allegations as to malice and probable cause are cured by an answer admitting the imprisonment, setting out all the facts, and attempting a justification.[96]

In an action to recover under an agreement to deliver seed vital and fit for seed purposes, a failure to allege in the petition that the seed furnished were vital and fit for seed purposes is remedied by an answer averring that they were unfit for seed purposes and were not vital.[97]

"defendants, and each of them, have or claim some interest in and to the premises above described," and W., one of such others, without objection, files a full answer, setting up all his claims and interests in the premises, and a trial is had on such pleadings, and both plaintiff and W. introduce evidence, and findings are made and judgment rendered, though plaintiff's petition as against W. is defective, yet W., by his answer and other acts, waives the defects. Clay v. Hildebrand, 9 P. 466, 34 Kan. 694.

Under Gen. St. 1889, par. 4223, directing that errors not affecting the merits be disregarded, a defect in a petition in an action to vacate a judgment, arising from failure to set forth the judgment, was cured by an answer admitting rendition of the judgment, and evidence, containing the petition, summons, and judgment in full, where the question of the sufficiency of the petition was raised only by objection to evidence because it failed to state a cause of action. Schnitzler v. Fourth Nat. Bank, 42 P. 496, 1 Kan. App. 674.

Appointment of receiver to protect property and hold revenues pending final result or suit to cancel a guardian's lease and quiet title, held not error, though the ancillary petition was not verified, where a verified answer admitted facts alleged in the petition authorizing appointment of receiver. Ward v. Inter-Ocean Oil & Gas Co., 52 Okl. 490, 153 P. 115.

[94] Bierer v. Fretz, 4 P. 284, 32 Kan. 329.

Where a petition inferentially states a fact, and the answer admits the fact, and the defendant objects to the introduction of any evidence under the petition because it does not state such fact, and the court overrules the objection, held not error. Atchison, T. & S. F. R. Co. v. Gabbert, 8 P. 218, 34 Kan. 132.

[95] Knight v. Dalton, 83 P. 124, 72 Kan. 131.

[96] Arkansas City Bank v. McDowell, 52 P. 56, 7 Kan. App. 568.

[97] D. M. Ferry & Co. v. Ballinger, 60 P. 824, 8 Kan. App. 756.

Where defendants plead facts amounting to a waiver of a condition in the policy, a failure of plaintiff to plead such waiver is cured.[98]

Where the petition contains two counts, one for recovery of a real estate agent's commission, the other on a note given for the same debt, and defendant files a general denial and plea that the note has been altered, plaintiff is entitled to a trial on both counts.[99]

Where the petition against the indorser of a note fails to allege notice of dishonor or facts excusing notice, but the indorser sets up a failure to give notice, and plaintiff replies, alleging facts excusing the failure, and the case is tried on the issues thus joined, the defects are cured.[1]

Where the petition in holder's action against maker and indorser, which because of scrivener's inadvertence in copying note set out in its body failed to allege notice of dishonor or any excuse, after admission of note in terms waiving notice of protest, court, in interest of justice, should treat the petition as amended.[2]

In an action for conversion, where possession was not alleged in the pleading, the defect was cured by the introduction, without objection at any time in the trial court, of evidence proving such possession.[3]

An indefinite answer is cured by the admission without objection of evidence supplying the omissions.[4]

A complaint for negligence, though not alleging that plaintiff used due care, is not cured by verdict for plaintiff.[5]

Failure of a petition in an action for price of land to allege tender of a deed is cured by judgment requiring plaintiff to deposit a deed before rendition of judgment.[6]

Where plaintiff recovered, and defects in the petition were not challenged by demurrer, objections to testimony, or motion for

[98] Milwaukee Mechanics' Ins. Co. v. Sewell (Okl.) 168 P. 660.
[99] Gonder v. Dodge, 155 P. 937, 97 Kan. 562.
[1] Shaffer v. Govreau, 128 P. 507, 36 Okl. 267.
[2] Whitaker v. Bruner (Okl.) 175 P. 238.
[3] Long-Bell Lumber Co. v. Webb, 52 P. 64, 7 Kan. App. 406.
[4] Bailey v. Parry Mfg. Co., 59 Okl. 152, 158 P. 581.
[5] City of Guthrie v. Nix, 41 P. 343, 3 Okl. 136.
[6] Witt v. Boothe, 158 P. 851, 98 Kan. 554.

new trial, the petition would be regarded after judgment as amended.[7]

Where defendants do not appear until after judgment, objections that the petition fails to support the judgment will be overruled, unless it fails to allege some matter essential to the relief sought.[8]

Any error in overruling objections to evidence in ejectment because the petition fails to set up copies of instruments making up chain of title is cured by amendment after verdict without objection or exception setting up such copies.[9]

§ 663. Waiver

"When the defects do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action." [10]

Where an attorney fails to point out clearly the grounds of his objection to pleadings or proceedings, he will ordinarily be deemed to have waived his objection.[11]

Irrelevancy and redundancy in a pleading are waived by failure to move to strike it in the trial court.[12]

Incapacity of the plaintiff to sue, which appears on the face of the petition, must be taken advantage of by either an answer or a demurrer, or the defect is waived.[13]

Where parties submit issues to court on agreed state of facts, generally such action waives error in rulings on the pleadings.[14]

Where a defective petition sets forth a prima facie cause of ac-

[7] Farmers' & Merchants' Nat. Bank v. Gann, 148 P. 249, 95 Kan. 237.

[8] Hoehler v. Short, 140 P. 146, 40 Okl. 681.

[9] Randals v. Paro (Okl.) 168 P. 216.

[10] Rev. Laws 1910, § 4742.

[11] Emery v. Bennett, 155 P. 1075, 97 Kan. 490, Ann. Cas. 1918D, 437.

[12] Hunt v. Jones, 128 P. 1094, 35 Okl. 252.

[13] Where a widow sues for the wrongful death of her husband and alleges that no personal representative has been appointed, widow's incapacity to sue must be taken advantage of by demurrer or answer, or defect will be waived. Chicago, R. I. & P. Ry. Co. v. Brooks, 57 Okl. 163, 156 P. 362.

[14] Powell v. Crittenden, 57 Okl. 1, 156 P. 661; Enid City Ry. Co. v. City of Enid, 144 P. 617, 43 Okl. 778.

tion and is met by answer instead of demurrer, it will be deemed sufficient.[15]

When a case is tried by the court on an agreed statement of facts, and no objection is raised to the sufficiency of the petition, any defect therein which could be cured by an amendment is waived.[16]

A defendant cannot complain of the insufficiency of a petition to present an issue in which it voluntarily joined, where such issue was fully tried on the merits.[17]

A party, accepting all the issues tendered by the petition, and defending the case against all the theories presented, will not be granted a new trial because of the inconsistency of such theories.[18]

Any error in overruling a demurrer is waived, where defendant answered an amended petition, curing the defect, and went to trial without objection.[19]

Where a petition in equity was defective, in that it contained no offer to place defendant in statu quo, defendant waived his right

[15] Naugle v. Naugle, 132 P. 164, 89 Kan. 622.

Where failure of petition on foreclosure of mechanic's lien to allege that the material furnished was actually used in the building was not challenged by demurrer, the defect was waived. Ryndak v. Seawell, 76 P. 170, 13 Okl. 737.

A bill of particulars praying for specific property or its value and also for damages is sufficient under Rev. Laws 1910, § 4807, to warrant recovery of damages for the detention in absence of objection. Weleetka Light & Water Co. v. Castleberry, 142 P. 1006, 42 Okl. 745.

In an action for partition, where a petition avers parties are tenants in common, but not that plaintiffs are in possession, and there is not joined with the demand for partition an action for possession, and the defendant answers, claiming title and possession, and asking that title be quieted, and the sufficiency of plaintiffs' petition is not challenged by defendant, he thereby waives all objections to its sufficiency. Moorehead v. Robinson, 75 P. 503, 68 Kan. 534.

[16] State Bank of St. John v. Norduff, 43 P. 312, 2 Kan. App. 55.

[17] Triple Tie Ben. Ass'n v. Wood, 98 P. 219, 78 Kan. 812.

Where, in ejectment, counsel in opening statement spoke of the defendant's conversion of plaintiff's personalty, and the court without objection permitted evidence as to damages for such conversion, though it was not pleaded, held, that the pleading should be construed as broad enough to include those elements of damage, or that the issues were enlarged by consent of parties. Custer v. Royse, 104 Kan. 339, 179 P. 353.

[18] Provident Loan Trust Co. v. McIntosh, 75 P. 498, 68 Kan. 452, 1 Ann. Cas. 906.

[19] Commerce Trust Co. v. School Dist. No. 37 of Pontotoc County, 47 Okl. 111, 147 P. 303.

to attack it on that ground, where he answered to the merits and went to trial upon the issues tendered.[20]

When causes of action have been improperly joined, if no objection is taken by demurrer, the error is waived.[21]

It is too late to object for the first time on the trial of a cause to the insufficiency of a petition on technical grounds, or to any amendment which has been answered and issues joined thereon.[22]

The sufficiency of the allegations of a petition to state a cause of action cannot be questioned for the first time by a motion to set aside a sheriff's sale made pursuant to the judgment rendered in the case.[23]

Failure to plead estoppel or waiver may be waived by plaintiff by proceeding without objection as though such defense had been pleaded.[24]

The pleading of inconsistent defenses is waived, where plaintiff replies and joins issue thereon and makes no objection until motion for a new trial.[25]

An answer charging contributory negligence in general terms is sufficient, if a motion to make definite and certain has not been filed.[26]

Objection on the ground that it does not state a cause of action

[20] Smith v. Smith, 89 P. 896, 75 Kan. 847.

[21] Tucker v. Hudson, 38 Okl. 790, 134 P. 21; Reynolds v. Hill, 114 P. 1108, 28 Okl. 533; Oates v. Freeman, 57 Okl. 449, 157 P. 74.

In ejectment for several distinct parcels of land, where plaintiff's title as to all defendants is the same, and the answer sets up misjoinder of causes of action, because some of the defendants claim separate interests in separate parcels, but admits that all defendants are in possession of all the real estate, the misjoinder is no ground for objection to the introduction of testimony, or demurrer to the evidence; and, where none of defendants ask a separate trial, and the action proceeds as though there was no misjoinder, it will be regarded as immaterial. Blodgett v. Yocum, 103 P. 128, 80 Kan. 644.

One appearing and answering a cross-action against him without objection waives misjoinder of causes of action in the cross-petition. State Exch. Bank v. National Bank of Commerce (Okl.) 174 P. 796, 2 A. L. R. 211; Same v. Traders' Nat. Bank (Okl.) 174 P. 799.

[22] City of Guthrie v. Finch, 75 P. 288, 13 Okl. 496.

[23] Birmingham v. Leonhardt, 43 P. 996, 2 Kan. App. 513.

[24] First Bank of Texola v. Terrell, 44 Okl. 719, 145 P. 1140, Ann. Cas. 1917A, 681.

[25] Kaufman v. Boismier, 105 P. 326, 25 Okl. 252.

[26] Kirkland v. Atchison, T. & S. F. Ry. Co., 104 Kan. 388, 179 P. 362.

is waived by failure to demur to a counterclaim seeking affirmative relief.[27]

Where defendant voluntarily goes to trial without a reply being filed, when he is not bound to do so, he waives it, and is regarded as consenting to go to the proof of the answer as if it were denied.[28]

Departure in a reply is waived by failure to move to strike.[29]

Where a petition is filed, defendant answers, and plaintiff replies by a general denial, and afterwards defendant files an amended answer, including the allegations in his first answer, and, in addition thereto, sets up new matter, and no reply is filed to this amended answer; and the parties go to trial thereon without objection, all the allegations of the amended answer are put in issue by the reply of plaintiff, except the new matter contained in the amended answer; and, if a reply by plaintiff is necessary to the amended answer, defendant waives such reply by proceeding to trial without objection and as if a reply had been filed.[30]

An objection to a reply for variance cannot be made by a de-

[27] Wyman v. Herard, 59 P. 1009, 9 Okl. 35.

Where a counterclaim for damages for an alleged wrongful attachment is set up in answer, plaintiff, by filing a reply, thereby joins issue and waives objection that such damages were not the proper subject for a counterclaim. Word v. Nakdimen (Okl.) 178 P. 257.

[28] Patterson v. Choate, 50 Okl. 761, 151 P. 620; Holt v. Holt, 102 P. 187, 23 Okl. 639; Kepley v. Carter, 30 P. 182, 49 Kan. 72; Allison v. Bryan, 109 P. 934, 26 Okl. 520, 30 L. R. A. (N. S.) 146, 138 Am. St. Rep. 988; Leach v. Altus State Bank, 56 Okl. 102, 155 P. 875.

[29] Purcell v. Corder, 124 P. 457, 33 Okl. 68; Stuart v. Grayson (Okl.) 162 P. 956; St. Paul Fire & Marine Ins. Co. v. Mountain Park Stock Farm Co., 99 P. 647, 23 Okl. 79.

Defendant, who submits the cause to the jury without objection to the pleadings or the evidence, will be held to have accepted all the issues tendered, and waived any question of the departure of the reply from the petition. Consolidated Kansas City Smelting & Refining Co. v. Osborne, 71 P. 838, 66 Kan. 393.

In an action on a note by an indorsee against the maker, the answer was fraud in its inception, plaintiff replied, denying each and all of the allegations in the answer, inconsistent with or denying allegations of the petition. Held that, though the reply was defective, as the parties proceeded through two trials as if it were sufficient, and the fraud alleged was in issue, defendant is not in a position to insist that the fraud was admitted. First Nat. Bank v. Abmeyer, 108 P. 94, 82 Kan. 283.

[30] Cooper v. Davis Sewing Mach. Co., 15 P. 235, 37 Kan. 231.

fendant who has filed a special answer setting forth a false issue, to which any reply would be sufficient.[31]

Where a demurrer to a pleading is sustained, and the pleader asks leave to amend, he waives the error in sustaining such demurrer, and in order to take advantage of any error in the ruling he must stand on his pleading.[32]

The filing of an amended pleading on the sustaining of a demurrer to the original pleading is a waiver of any error in the ruling on the demurrer.[33]

Defendant who files an answer within time granted therefor after overruling of the demurrer, waives any error in overruling the demurrer,[34] unless an exception to the ruling was taken.[35]

[31] Plaintiff in an action on a policy alleged a total loss, which defendant in his answer denied generally, averring the loss to be partial, and not total, and set forth as a special defense that an appraisal required by the policy had not been completed, and that the action was prematurely brought, which special answer was surplusage and constituted no defense to the action stated. Plaintiff's reply alleged abandonment of the appraisement by defendant. Held, that the reply was responsive to the special matter pleaded, and an objection that it was variant with the cause of action stated in the petition could not be raised by defendant; it having by special answer set forth a false issue, to which any reply would be sufficient. Liverpool & L. & G. Ins. Co. v. Heckman, 67 P. 879, 64 Kan. 388.

[32] Board of Com'rs of Garfield County v. Beauchamp, 88 P. 1124, 18 Okl. 1; State v. Martin, 62 Okl. 295, 162 P. 1088; Berry v. Barton, 71 P. 1074, 12 Okl. 221, 66 L. R. A. 513; Childsey v. Ellis, 125 P. 464, 31 Okl. 107; Morrill v. Casper, 73 P. 1102, 13 Okl. 335; Cates v. Miles (Okl.) 169 P. 888; Guess v. Reed, 49 Okl. 124, 152 P. 399.

[33] Bank of Santa Fé v. Haskell County Bank, 38 P. 485, 54 Kan. 375; Kingman v. Pixley, 54 P. 494, 7 Okl. 351; Pattee Plow Co. v. Beard, 110 P. 752, 27 Okl. 239, Ann. Cas. 1912B, 704; Campbell v. Thornburgh, 57 Okl. 231, 154 P. 574; Wallace v. Blasingame, 53 Okl. 198, 155 P. 1143; Cabell v. McLish, 61 Okl. 224, 160 P. 592; Brown v. J. I. Case Plow Works, 59 P. 601, 9 Kan. App. 685.

[34] Munson v. First Nat. Bank of Okmulgee, 58 Okl. 284, 159 P. 486.

Where defendant demurs to a complaint as not stating a cause of action, and the demurrer is overruled, and, without raising exceptions, defendant answers, any defects in the complaint are cured. Sanford v. Weeks, 18 P. 823, 39 Kan. 649.

Where a petition on a policy failed to show that plaintiff had not performed the conditions precedent, and after the overruling of a demurrer defendant filed an answer, alleging failure to comply with the provisions of the policy, the grounds of demurrer were waived. American Ins. Co. of Newark, N. J., v. Rodenhouse, 128 P. 502, 36 Okl. 211.

Where the petition does not allege compliance with the conditions precedent

[35] Simmons v. Chestnut-Gibbons Grocery Co. (Okl.) 173 P. 217.

Where a demurrer is sustained to certain paragraphs of the answer, and defendant files an amended answer setting up the same defenses and issues are joined thereon, error in sustaining the demurrer is waived.[36]

A party who seeks to have the ruling on a demurrer to the petition reviewed must elect to stand on the demurrer, and at once bring the case to the appellate court, or an answer may be filed, and when the case is tried, if it is tried on the original petition, and then brought up by the party demurring, the ruling on the demurrer will be passed on.[37]

The asking and obtaining of leave to file an amended petition at end of trial waives any error in denying application to amend original pleading or any error in proceedings prior to filing of amended petition.[38]

Verification of the denial of the execution of a written instrument is not waived, though there be no motion to strike the pleading from the file.[39]

Where upon retrial the petition was amended so that the facts stated in the amended petition constituted a new cause of action, which would be barred by expiration of the period of limitation after the filing of the original petition, and before the filing of the amended petition, but at the former trial the case was tried on the theory set up in the amended petition, defendant, having acquiesced in such interpretation of the original petition, is precluded from objecting that the amended petition set up a new cause of action.[40]

Where plaintiff is permitted to file a supplemental petition during the trial without previous notice, and defendant objects to the filing on grounds other than want of notice, and proceeds with the

to an action, and a demurrer is overruled, and defendant alleges that plaintiff has failed to comply with the conditions, the grounds of demurrer are waived. Rochester German Ins. Co. of Rochester, N. Y., v. Rodenhouse, 128 P. 508, 36 Okl. 378.

[36] Pacific Mut. Life Ins. Co. of California v. O'Neil, 130 P. 270, 36 Okl. 792.

A plaintiff in ejectment, who, on second trial as a matter of right, replied to an answer to which a demurrer had been sustained, and objected to an amended answer, held to have waived the demurrer. Johnson v. Myers, 122 P. 713, 32 Okl. 421.

[37] Union Pac. Ry. Co. v. Estes, 15 P. 157, 37 Kan. 229.

[38] Cornelssen v. Harman, 103 Kan. 624, 176 P. 141.

[39] St. Louis & S. F. R. Co. v. Bruner, 52 Okl. 349, 152 P. 1103.

[40] Taylor v. Atchison, T. & S. F. Ry. Co., 68 P. 691, 64 Kan. 888.

trial without making an application for delay, he cannot afterwards complain of want of notice.[41]

The lack of verification of a pleading is waived by pleading over and going to trial on the merits without objection.[42]

A party who challenges the form or sufficiency of a verified pleading should attack it by motion before the introduction of the evidence is begun, and an objection made after the introduction of the evidence is ordinarily too late to be available.[43]

Where, on sustaining objection to the sufficiency of plaintiff's pleading, he avails himself of leave to amend, he thereby waives his right to complain of the ruling.[44]

Error, if any, in striking matter from an amended answer, is waived by defendant's taking leave to file and filing a further amendment.[45]

[41] King v. Hyatt, 32 P. 1105, 51 Kan. 504, 37 Am. St. Rep. 304.

Where plaintiff, without objection, filed a supplemental petition setting up a new cause of action, the error, if any, was waived where defendant filed answer and went to trial upon the issues so joined under Rev. Laws 1910, § 4742, providing that where certain defects, including misjoinder of causes of action, exist in the petition, and no objection is taken by demurrer or answer, defendant shall be deemed to have waived such objections with immaterial exceptions. Reynolds v. Hill, 114 P. 1108, 28 Okl. 533.

[42] Boston Loan & Trust Co. v. Organ, 36 P. 733, 53 Kan. 386.

Plaintiff, not objecting to an unverified plea of intervention before proceeding to trial, is deemed to have waived any objection to the failure to verify such plea. Farmers' State Bank of Ada v. Keen (Okl.) 167 P. 207.

Defective verification of a petition on which a restraining order was granted ex parte was waived where defendant answered to the merits without objecting to the petition. Galbreath Gas Co. v. Lindsey, 129 P. 45, 35 Okl. 235.

Any defect or irregularity in the verification of a petition for an injunction is waived, where, without raising it, defendant answers to the merits. Glasco v. School Dist. No. 22, McClain County, 103 P. 687, 24 Okl. 236.

The failure of defendant, in an action on a note, to verify his answer denying execution was waived by the filing of a reply denying the allegations of the answer. Jones v. Citizens' State Bank, 39 Okl. 393, 135 P. 373.

Where a pleading denies the execution of a written instrument, and is verified by an attorney, and no objection is made to the verification until evidence is offered in support of the denial, it is not error to overrule an objection made on the ground that the affidavit does not show that the facts were within the personal knowledge of the attorney. Hoopes v. Buford & George Implement Co., 26 P. 34, 45 Kan. 549.

[43] Hornick v. Union Pac. R. Co., 118 P. 60, 85 Kan. 568, 38 L. R. A. (N. S.) 826, Ann. Cas. 1913A, 208.

[44] Pappe v. Post, 101 P. 1055, 23 Okl. 581.

[45] Ott v. Elmore, 73 P. 898, 67 Kan. 853.

Where a motion to strike and a demurrer are sustained to an answer, and

A defendant who has been brought in by a supplemental petition, by answering and going to trial waives questions of jurisdiction raised by a prior motion to dismiss on the grounds that the original petition had fully performed its functions as a pleading in the cause before the supplemental petition was filed, and that the supplemental petition was filed without notice to him.[46]

The error in striking out a supplemental and amended answer was waived by filing a second supplemental and amended answer, alleging most of the facts set up in the stricken answer, which was permitted to stand unchallenged, as it superseded the one stricken out.[47]

Where the petition sets forth the manner of the indebtedness of defendant to plaintiff, and defendant's answer is a general denial, but at the trial defendant's evidence tends to establish a counterclaim, and no objection is made to its introduction on the ground that the pleadings did not authorize it, if the action is tried, and the evidence admitted as though the answer were sufficient to allow the evidence to be introduced, the objection is waived.[48]

In a suit to foreclose a lien for materials, where there is a general denial, and also denial of any debt, and the case is tried on the issue of payment without objection, until certain evidence is offered, the findings for defendant will not be disturbed on the ground that such issue is not made by the pleadings.[49]

Where the petition did not allege that the locomotive was defective, but defendant tried the case on the assumption that the existence of defects was an issuable fact, defendant could not object to evidence, introduced by plaintiff tending to show that the spark arrester on the engine was defective.[50]

The question of variance between pleading and proof must be raised at a time which will permit an amendment of the pleading on such terms as may be just, and the adverse party must not only

defendants by leave file an amended answer repleading the eliminated matter, any error in orders sustaining the motion and demurrer is waived. Schuber v. McDuffee (Okl.) 169 P. 642.

[46] Beecher v. Ireland, 54 P. 9, 8 Kan. App. 10.

[47] Robertson v. Christenson, 90 Kan. 555, 135 P. 567.

[48] Feidler v. Motz, 22 P. 561, 42 Kan. 519.

[49] Chicago Lumber Co. v. Limerick, 36 P. 710, 53 Kan. 395.

[50] Kansas City, Ft. S. & M. R. Co. v. Chamberlain, 61 Kan. 859, 60 P. 15.

have been misled to his prejudice, but the fact must be shown to the satisfaction of the trial court.[51]

Where, in an action for money loaned, defendant answered that the money was invested in cattle in which the parties were partners, and the court found that the money loaned was invested in partnership cattle, and afterwards defendant agreed to take plaintiff's interest and repay the amount invested by him, and gave judgment for plaintiff, no objection having been made till after judgment, there was not a fatal variance.[52]

An averment that a certain person was general manager of a railway company, and that, on behalf of the company, he promised to give a pass over its roads, is a sufficient allegation of the authority of the agent, after judgment for plaintiff, when there is no showing that such averment was challenged at the trial.[53]

§ 664. Objection to introduction of any evidence—Form

An objection to the introduction of any evidence under a petition is good only when there is a total failure to allege in the petition some matter essential to recovery, and is not good when the allegations are simply indefinite or statements of conclusions of law.[54] When this is the only objection to a petition its allegations will be liberally construed, and when there is not a total failure of averment as to some essential matter, the allegations are simply incomplete, and objection to the introduction of evidence is properly overruled.[55]

[51] Missouri, K. & T. Ry. Co. v. Green, 89 P. 1042, 75 Kan. 504.

The petition alleged that defendant was negligent in permitting the roof of his warehouse to become leaky, and that water came in and fell upon plaintiff's goods stored there, and that defendant negligently permitted them to remain wet, and they thus became damaged. The proof seemed to show that the water came into the room from the street, and not through the roof. Held, that there was not such a variance as would warrant the court in sustaining a demurrer to the evidence. Red Ball Transfer & Storage Co. v. Deloe, 30 Okl. 522, 120 P. 575.

Where plaintiff, in an action for injuries, sought to expand his charge of negligence by proving the speed of the train to which testimony defendants objected, and moved to strike it out after it had been admitted, and by an instruction sought to limit the jury's inquiry to the issue presented by the pleading, a claim that defendants acquiesced in the enlargement of the issues is not sustained. Judgment, 79 P. 673, 70 Kan. 755, reversed on rehearing. Chicago, R. I. & P. Ry. Co. v. Wheeler, 83 P. 27, 70 Kan. 760.

[52] Mulhall v. Mulhall, 41 P. 109, 3 Okl. 304.

[53] Atchison, T. & S. F. R. Co. v. English, 16 P. 82, 38 Kan. 110.

[54] First Nat. Bank v. Cochran, 87 P. 855, 17 Okl. 538.

[55] Id.; Ball v. White, 50 Okl. 429, 150 P. 901; Johnston v. Chapman, 38 Okl.

General averments of fraud in a petition are sufficient as against an objection to the introduction of evidence thereunder.[56] The practice of questioning the sufficiency of a petition by objections to evidence is not to be encouraged, and the objections should be overruled, if under any fair construction of the petition any cause of action is stated.[57]

42, 131 P. 1076; Abbott v. Dingus, 44 Okl. 567, 145 P. 365; Sulsberger & Sons Co. v. Castleberry, 40 Okl. 613, 139 P. 837; Thorp v. St. Louis & S. F. R. Co. (Okl.) 175 P. 240; First Nat. Bank v. Harkey, 63 Okl. 163, 163 P. 273; Sharpless Separator Co. v. Gray, 62 Okl. 73, 161 P. 1074; Wilson v. Eulberg, 51 Okl. 316, 151 P. 1067; Blackert v. Lankford (Okl.) 176 P. 532; Missouri, K. & T. Ry. Co. v. Murphy, 90 P. 290, 75 Kan. 707; Hogan v. Bailey, 110 P. 890, 27 Okl. 15; Young v. Severy, 49 P. 1024, 5 Okl. 630.

In action for breach of contract, failure to allege performance on plaintiff's part presented only by objection to evidence and not by demurrer held immaterial. Capper v. Manufacturers' Paper Co., 121 P. 519, 86 Kan. 355.

The payment of money to secure the liberty and discharge of one who has been imprisoned on a malicious prosecution must be specifically averred in a suit to recover damages therefor; but averment is sufficiently made if it is declared in the petition that the plaintiff has been "forced to pay out and expend large sums of money in securing his liberty and discharge," if the objection is first made at the trial to the introduction of evidence tending to show what payments have been made by the plaintiff for that purpose. Ten Cate v. Fansler, 65 P. 375, 10 Okl. 7.

In an action by a servant for injuries, the petition alleged that "one V. was employed by said defendant and was in charge of said machine, and that the plaintiff herein was employed to take and carry away the staves after they had been planed." It was further alleged that defendant was the owner and operator of the plant in which the machine referred to was situated, and that plaintiff was obliged to obey a foreman of a department thereof. No demurrer was filed, and a motion to make more definite did not refer to the failure to directly allege employment by defendant. Held, that a motion objecting to the introduction of testimony on account of such failure was properly overruled. Brower v. Timreck, 71 P. 581, 66 Kan. 770.

Where plaintiff died pending action, amendment of petition by administratrix, in whose name action was revived, stating that plaintiff died intestate and that administratrix was duly appointed by probate court, had duly qualified, and was acting administratrix of plaintiff, was sufficient against objection to introduction of evidence. Estes v. Edgar Zinc Co., 156 P. 758, 97 Kan. 774.

An objection to the introduction of evidence under a petition to set aside a deed to property of which plaintiff is not in possession, alleged to have been procured by undue influence, is properly overruled, though a prayer for partition is joined with that for other relief. Howard v. Carter, 80 P. 61, 71 Kan. 85.

[56] Howard v. Carter, 80 P. 61, 71 Kan. 85.

[57] Id.

Where a petition states a cause of action for damages for fraud, and defendant answers, and trial is had on that theory, an objection that the peti-

Every legal intendment is indulged in support of an answer attacked, and if it may be construed to state a defense, etc., objection to evidence in support of answer will not be sustained merely because allegations are indefinite or mere legal conclusions.[58]

A departure in the reply from the petition,[59] or the failure to verify a pleading, cannot be taken advantage of by objection to the introduction of any evidence thereunder, but should be raised by motion to strike out.[60]

Misjoinder of causes of action cannot be met by an objection to introduction of evidence.[61]

Failure of a petition to state a cause of action may be presented by an objection to the introduction of any evidence.[62]

An objection to the introduction of evidence on the ground that the petition does not state a cause of action is equivalent to a demurrer to the petition and cannot be used to raise the objection of the uncertainty of the petition,[63] and raises no issue of fact.[64]

Where the complaint does not state facts sufficient to constitute a cause of action, and an objection is made by defendant to the introduction of any evidence under it for that reason, the objection should be sustained, even though defendant has answered.[65] But in the absence of a demurrer or motion, unless there is a total omission to allege some essential material fact, the petition will be held good on an objection to the introduction of evidence,[66] and the

tion was not drawn upon any definite theory cannot be raised by objection to the evidence. Allen v. Datschewski, 142 P. 953, 92 Kan. 933.

[58] First Nat. Bank v. Humphreys (Okl.) 168 P. 410.

[59] St. Paul Fire & Marine Ins. Co. v. Mountain Park Stock Farm Co., 99 P. 647, 23 Okl. 79; Merchants' & Planters' Ins. Co. v. Marsh, 125 P. 1100, 34 Okl. 453, 42 L. R. A. (N. S.) 996; Purcell v. Corder, 124 P. 457, 33 Okl. 68; Landon v. Morehead, 126 P. 1027, 34 Okl. 701.

[60] Doughty v. Funk, 103 P. 634, 24 Okl. 312.

[61] State Exch. Bank v. National Bank of Commerce (Okl.) 174 P. 796, 2 A. L. R. 211; Same v. Traders' Nat. Bank (Okl.) 174 P. 799.

[62] Lankford v. Schroeder, 47 Okl. 279, 147 P. 1049, L. R. A. 1915F, 623.

[63] Wey v. City Bank, 116 P. 943, 29 Okl. 313; Shultz v. Jones, 3 Okl. 504, 41 P. 400.

[64] Cowart v. Parker-Washington Co., 136 P. 153, 40 Okl. 56.

[65] Church v. Atchison, T. & S. F. R. Co., 29. P. 530, 1 Okl. 44.

Where a petition fails to state a cause of action, the trial court should sustain an objection to the introduction of evidence thereunder. Willoughby v. Ball, 90 P. 1017, 18 Okl. 535.

[66] Marshall v. Homier, 74 P. 368, 13 Okl. 264.

court will consider all the pleadings in the case, and if, from all of them, it can find that there is a cause of action for plaintiffs, the motion will be overruled.[67]

Where a petition states a cause of action in general terms, and defendant answers, he cannot by demurrer to the evidence question the sufficiency of the petition.[68]

Testimony tending to support the allegation will not be excluded, because not specifically pleaded, and where no motion is made to make it more certain.[69]

Where the petition alleges ownership generally, but the reply admits the ownership to be special, as that of a mortgagee, an objection to evidence under the repugnant matter in the reply should be sustained.[70]

An objection to any evidence under the petition, because of the omission of the allegations of certain material facts is waived, if evidence is introduced on the trial to prove such facts, without objection.[71]

When it is essential that one insisting on specific performance make out complete equity, he must show that the contract sued on is capable of being specifically enforced, and where it is disclosed that the contract is unreasonable in its terms and void under the statute of frauds and that the acts done are not such that damages would be an inadequate remedy, and plaintiff has within his control money more than sufficient to compensate him for any loss sustained, objection to the introduction of evidence thereunder is properly sustained.[72] Where the only objection to a petition is by objection to the introduction of evidence at the trial, the court will determine only whether it states a cause of action in equity, and if

[67] Id.; Missouri, O. & G. Ry. Co. v. McClellan, 130 P. 916, 35 Okl. 609; De Watteville v. Sims, 44 Okl. 708, 146 P. 224; Litsch v. Kansas Gas & Electric Co., 148 P. 632, 95 Kan. 496.

If a pleading treated as an answer with a demurrer waived states a cause of action, though defectively, an objection to the introduction of testimony will be overruled. State Exch. Bank v. National Bank of Commerce (Okl.) 174 P. 796, 2 A. L. R. 211; Same v. Traders' Nat. Bank (Okl.) 174 P. 799.

[68] Elliott v. Hudson, 113 P. 307, 84 Kan. 7.

[69] St. Louis & S. F. Ry. Co. v. Henry, 46 Okl. 526, 149 P. 132.

[70] Johnson v. State Bank of Seneca, 52 P. 860, 59 Kan. 250.

[71] Baden v. Bertenshaw, 74 P. 639, 68 Kan. 32.

[72] Haffner v. Dobrinski, 88 P. 1042, 17 Okl. 438, judgment affirmed 30 S. Ct. 172, 215 U. S. 446, 54 L. Ed. 277.

the facts pleaded are sufficient, and in their nature properly cognizable by a court of equitable jurisdiction, the objection will be overruled.[73]

Objection to evidence because incompetent, irrelevant, and immaterial is insufficient to test sufficiency of petition, counterclaim, etc., or whether it is a proper subject of litigation when it has not been tested by demurrer, motion, or objection to introduction of any evidence on ground that pleading states no cause of action or defense.[74]

An objection to the introduction of evidence under an answer should be sustained, where it clearly appears that the answer fails to state a defense.[75]

Where a cross-petition does not state a cause of action against plaintiff, the court should decline to hear evidence in support thereof.[76]

Where the question of a variance between the pleading and proof is first raised by a demurrer to the evidence, it will not be regarded as fatal, when it appears that the party objecting was neither surprised, misled, or prejudiced thereby.[77]

OBJECTION TO INTRODUCTION OF EVIDENCE

(Oral.)

Comes now the defendant and objects to the introduction of any evidence, for the reason that plaintiff's petition filed herein wholly fails to allege facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant.

[73] Id.

[74] Scanlan v. Barkley (Okl.) 178 P. 674.

[75] Hilton v. Bailey, 46 Okl. 759, 149 P. 863.

Overruling of objection to evidence by the defendant purchaser, who set up failure of title as a defense, held error, where his answer did not contain an offer to reconvey. Herron v. Harbour, 57 Okl. 71, 155 P. 506.

Where a defendant is estopped from making a claim of damages or questioning the amount of a debt by a former judgment or decree, it is not error to sustain an objection to the introduction of evidence when offered to establish such defenses. Engle v. Legg, 39 Okl. 475, 135 P. 1058.

[76] McConnell v. Davis, 46 Okl. 201, 148 P. 687.

[77] Collier v. Monger, 75 Kan. 550, 89 P. 1011.

ARTICLE X

MOTIONS AND ORDERS THEREON

Division I.—Motions in General

Sections

665. Definition—Several objects.
666. Notice—Form.
667. Service—Return—Form.
668. By officer—Fees.
669. Appearance.
670. Affidavits and pleadings to motion.
671. Hearing.
672. Effect of continuance.
673. Second motion.

Division II.—Orders

674. Ruling—Form.
675. Law of the case.
676. Nunc pro tunc order—Form.
677. Entry—Notice.
678. Vacating and modifying.

Division III.—Particular Motions

679. Motion to dismiss.
680. Motion for judgment on the pleadings—Nature—Form.
681. Grounds for sustaining or overruling.
682. Departure.
683. Judgment against verdict.
684. Motion to strike from files—Form.
685. Affirmative pleading.
686. Defensive pleadings.
687. Demurrer.
688. Departure.
689. Limitations.
690. Amended pleading.
691. Failure to amend.
692. Motion to strike from pleading—Form.
693. Motion to strike parties—Form.
694. Motion to make more definite and certain.
695. Form and requisites.
696. Time of making.
697. Waiver—Dismissal.
698. Motion to require pleader to separately state and number.
699. Form and requisites.
700. Waiver—Dismissal.
701. Motion to require election—Form.
702. Time of making.

Division I.—Motions in General

§ 665. Definition—Several objects

"A motion is an application for an order, addressed to the court, or a judge in vacation, or by any party to a suit or proceeding, or one interested therein, or affected thereby." [78]

"Several objects may be included in the same motion, if they all grow out of, or are connected with, the action or proceeding in which it is made." [79]

§ 666. Notice—Form

"Where notice of a motion is required, it must be in writing, and shall state the names of the parties to the action or proceeding in which it is made, the name of the court or judge before whom it is to be made, the place where and the day on which it will be heard, the nature and terms of the order or orders to be applied for; and if affidavits are to be used on the hearing, the notice shall state that fact, and it shall be served a reasonable time before the hearing." [80]

NOTICE OF MOTION

(Caption.)

To the Above Named Plaintiff, A. B., and His Attorney of Record, G. H.:

You and each of you are hereby notified that said defendant, C. D., has filed in the above entitled cause his motion to (stating kind of motion filed), a copy of which is hereto attached, and that the same will be presented in said court on the ——— day of ———, 19—, at ——— o'clock, ———, M., or as soon thereafter as counsel can be heard.

X. Y., Attorney for Defendant.

§ 667. ——— Service—Return—Form

"Notices of motions, mentioned in this article, may be served by a sheriff, coroner or constable, the party or his attorney, or by any other person, and the return of any such officer or affidavit of any such person shall be proof of service; the service shall be on the

[78] Rev. Laws 1910, § 5310.
[79] Rev. Laws 1910, § 5311.
[80] Rev. Laws 1910, § 5312.

party, or his attorney of record, and in case there is more than one party adverse to such motion, service shall be made on each party or his attorney." [81]

RETURN OF NOTICE OF MOTION

(*Acceptance of Service*)

Receipt of a copy of the above and foregoing notice, and of a copy of the motion therein referred to, is hereby acknowledged on behalf of plaintiff this ——— day of ———, 19—.

G. H., Attorney for Plaintiff.

(*Affidavit of Personal Service*)

(Venue.)

X. Y., being duly sworn, on oath says: That he is the attorney for the defendant in the above entitled action; that he served the attached notice on the plaintiff therein, A. B., on the ——— day of ———, 19—, by delivering to said A. B., personally, at his office in the city of ———, a true and correct signed duplicate original thereof.

X. Y.

Subscribed and sworn to before me this ——— day of ———, 19—.

———, Notary Public.

My commission expires ———, 19—.

§ 668. —— By Officer—Fees

"The service of a notice shall be made in the manner required by law for the service of a summons; and when served by an officer, he shall be entitled to like fees." [82]

§ 669. Appearance

The journal entry of a ruling of a trial court sustaining a motion to retax costs, reciting that the adverse party excepted to the ruling, sufficiently shows an appearance.[83]

[81] Rev. Laws 1910, § 5313.
[82] Rev. Laws 1910, § 5314.
[83] Teagarden v. Board of Com'rs of Linn County, 49 Kan. 146, 30 P. 171.

§ 670. Affidavits and pleadings to motion

On the hearing of a motion addressed to the discretion of the court and supported by affidavit, it is not error for the court to receive and consider counter affidavits tending to refute facts stated in affidavits supporting the motion and presenting other grounds for denying it.[84]

Answers or other pleadings to a motion are not required, and there is no provision for making up the issues for the trial of motions.[85]

§ 671. Hearing

Where numerous motions are pending for executions against stockholders of a corporation, and a petition is filed to set aside the judgment against the corporation as to them, and in the absence of the district judge the county judge grants a temporary injunction against the proceeding on the motions, the district court, in ordering that the hearing of the motions be postponed until further orders are made in the injunction proceedings, does not abuse its discretion.[86]

§ 672. Effect of continuance

Where a motion is made during the term and continued to another term, when it is decided, it is the same as if the decision was made at the term when it was filed.[87]

§ 673. Second motion

After a motion has been overruled, the movant has no right to file a second motion for the same relief on grounds existing at the time of the prior motion. It can only be done on leave of court, which is seldom granted.[88]

Where a party concludes that his motion is defective or insufficient, he should apply and obtain leave to amend or withdraw his first motion before filing a second motion.[89]

[84] Randall v. Randall, 101 Kan. 341, 166 P. 516.
[85] Berry v. Dewey (Kan.) 170 P. 1000.
[86] Gurney v. Steffens, 43 P. 241, 56 Kan. 295.
[87] St. Louis, I. M. & S. Ry. Co. v. Lowrey, 61 Okl. 126, 160 P. 716.
[88] Adams v. Lockwood, Englehart & Co., 30 Kan. 373, 2 P. 626.
[89] Kjellander v. Kjellander, 139 P. 1013, 92 Kan. 42.

Division II.—Orders

§ 674. Ruling—Form

A ruling on a motion will not be set aside, where there were sufficient grounds to sustain it, though such grounds were not relied on by the party seeking relief.[90]

ORDERS ON MOTIONS

(Caption.)

This cause coming on to be heard on the motion of the defendant to require the plaintiff to make his petition more definite and certain (or state other kind of motion), due proof of notice and copy of said motion on G. H., attorney for plaintiff having been made, and the court having heard said motion and being fully advised in the premises:

It is ordered that the plaintiff's petition herein be made more definite and certain by amendment in the following allegations (stating them and showing in what particular to be amended); and leave to amend said petition in that respect is hereby granted, said amendment to be filed within ——— days from this date.

Dated this ——— day of ———, 19—.

———, Judge.

§ 675. Law of the case

A ruling on a motion to suppress a deposition on grounds not appearing therein does not become the law of the case, so as to require the court, when the motion is renewed at a subsequent trial and supported by new proof of the invalidity of the deposition, to overrule it without consideration.[91]

Where an order is made denying a motion to quash service of summons, and a final judgment is rendered, and no appeal is taken, the matter arising on the motion to quash becomes res judicata and a bar to the right of defendant to raise the same question on a subsequent motion involving the same subject-matter.[92]

[90] Hancock v. Youree, 106 P. 841, 25 Okl. 460.
[91] Bethany Hospital Co. v. Hale, 77 P. 537, 69 Kan. 616.
[92] Rogers v. McCord Collins Mercantile Co., 91 P. 864, 19 Okl. 115.

§ 676. Nunc pro tunc order—Form

Every court of record may, on proper application, enter its orders, by nunc pro tunc entry, which the clerk has by mistake omitted from the record. The jurisdiction to order a nunc pro tunc entry is not lost by lapse of time, where no intervening rights are affected.[93] Such order may be made either on parol or on written evidence,[94] and is not open to collateral attack by a party to a proceeding, because not made upon sufficient evidence, or because of erroneous findings of fact, or because not supported by the findings of fact.[95] Though lapse of time may call for stronger testimony that an order was in fact made and as to the extent thereof, and as to the effect of the belated entry, when it is made, it may be enforced as if entered when originally made.[96]

Application for Order Nunc Pro Tunc—Nunc Pro Tunc Order

MOTION

(Caption.)

Comes now the said plaintiff, A. B., and respectfully represents and shows to the court that the order of this court made and entered herein on the ——— day of ———, 19—, recites that (setting forth facts incorrectly stated in order), whereas (state what facts were), and by a clerical error and mistake the said facts were erroneously stated in said order.

(Or, that the order of this court made the ——— day of ———, 19—, overruling the plaintiff's motion for judgment on the pleadings herein, and allowing plaintiff exceptions to such ruling, have not been regularly brought up and recorded by the clerk of this court.)

Wherefore plaintiff moves the court to enter an order nunc pro tunc herein, correcting said order (or record), to show (state correction to be made).

X. Y., Attorney for Plaintiff.

[93] Courtney v. Barnett (Okl.) 166 P. 207.

[94] Where an order is made by the probate court, and through mistake or neglect is not entered on the records, the court can enter such order nunc pro tunc even after considerable time and on either parol or written evidence. Graden v. Mais, 112 P. 107, 83 Kan. 481.

[95] Courtney v. Barnett (Okl.) 166 P. 207.

[96] Graden v. Mais, 112 P. 107, 83 Kan. 481.

ORDER

(Caption.)

This court having, on the ——— day of ———, 19—, made and entered in the above entitled cause its order reciting that (set forth facts incorrectly stated in order), whereas (set forth what facts were), and by a clerical error and mistake the said facts were erroneously stated in said order:

It is therefore hereby ordered that said order be and the same is hereby corrected and amended, so as to state that (state corrections).

Dated ———, 19—, this order to be entered nunc pro tunc as of ———, 19—.

———, Judge.

§ 677. Entry—Notice

The statute requiring orders made out of court to be entered on the journal is directory, and compliance therewith is not essential to the validity of the orders.[97]

In the absence of some statute or rule of court requiring it, parties who rely upon a custom of the clerk to notify them when orders are entered upon motions pending in their cases, do so at their peril.[98]

§ 678. Vacating and modifying

A court of record has inherent power on its own motion to vacate or modify its orders, however conclusive, during the term of their rendition or entry.[99]

An order is void which is made by the superior court at a subsequent term, vacating a former order without notice on its own motion, without complying with the statutes relative to the review of orders on motions.[1]

[97] Keenan v. Chastain, 64 Okl. 16, 164 P. 1145, withdrawing opinions on second rehearing 157 P. 326; Rev. Laws 1910, § 5317; Mutual Life Ins. Co. of New York v. Buford, 61 Okl. 158, 160 P. 928.

[98] Western Coal & Mining Co. v. Green, 64 Okl. 53, 166 P. 154.

[99] St. Louis, I. M. & S. Ry. Co. v. Lowrey, 61 Okl. 126, 160 P. 716.

[1] Hawkins v. Hawkins, 153 Pac. 844, 52 Okl. 786; Rev. Laws 1910, §§ 5267-5269.

Division III.—Particular Motions

§ 679. Motion to dismiss

The question of a former adjudication cannot be raised by a motion to dismiss.[2]

§ 680. Motion for judgment on the pleadings—Nature—Form

A motion for judgment on pleadings is in the nature of a demurrer, and is in substance both a motion and a demurrer; being a demurrer because it attacks the sufficiency of pleadings, and a motion because an application for an order for judgment.[3] It is not available, however, to dispose of the merits of the case.[4]

Every legal intendment is to be indulged in favor of the pleading attacked,[5] and if there is any reasonable doubt as to its sufficiency, a judgment on the pleadings should not be granted.[6]

[2] Attica State Bank v. Benson, 54 P. 1037, 8 Kan. App. 566.

For form of motion to dismiss, see ante, § 533.

[3] Deming Inv. Co. v. Reed (Okl.) 179 P. 35.

A motion for judgment on the pleadings is in the nature of a demurrer, and tests the sufficiency of the pleadings and presents a question of law as to whether the facts alleged are a defense. Schuber v. McDuffee (Okl.) 169 P. 642; Oliphant v. Crane (Okl.) 172 P. 1073; Mires v. Hogan (Okl.) 192 P. 811.

In action on note and to foreclose mortgage securing it, plaintiff's motion for judgment on the pleadings held properly sustained. Kerr v. McKinney (Okl.) 170 P. 685.

[4] Peck v. First Nat. Bank of Claremore, 50 Okl. 252, 150 P. 1039.

[5] Every legal intendment is indulged in support of an answer attacked, and if it may be construed to state a defense, a motion for judgment on the pleadings will not be sustained merely because allegations are indefinite or mere legal conclusions. First Nat. Bank v. Humphreys (Okl.) 168 P. 410.

[6] If there is any reasonable doubt as to the sufficiency of the pleading, judgment on the pleadings will not be granted. Peck v. First Nat. Bank of Claremore, 50 Okl. 252, 150 P. 1039. Where it is necessary for plaintiff to file reply to new matter set up in the answer, it is reversible error to render judgment on the pleadings on plaintiff's motion after his reply is filed. Id.

A motion for judgment on the pleadings in a justice court should be overruled where there is any reasonable doubt as to its sufficiency. Earl v. Tyler, 128 P. 269, 36 Okl. 179.

A motion for judgment on the pleadings, where filed by plaintiff to defendant's answer, should be granted only when such answer, allowing every reasonable intendment in its favor, does not deny or state a defense to the material allegations of the pleading. Cobb v. Wm. Kenefick Co., 100 P. 545, 23 Okl. 440.

On motion for judgment on averments in petition and opening statement of counsel, they should be liberally interpreted. Moffatt v. Fouts, 160 P. 1137, 99 Kan. 118.

A motion for judgment on the pleadings is in the nature of a demurrer, and admits for its purpose the truth of all facts well pleaded by the opposite party.[7]

It invokes the trial court's judgment on pleaded and undisputed facts, and the judgment is equivalent to a ruling on a demurrer.[8]

The district court has the inherent power to render a judgment on the pleadings without a motion.[9]

MOTION FOR JUDGMENT ON THE PLEADINGS

(Caption.)

Comes now the above named plaintiff, A. B., and moves the court to enter judgment on the pleadings in the above entitled action, as prayed for in plaintiff's petition, on the ground and for the reason that the answer and cross-petition filed herein are sham, frivolous, and wholly insufficient to constitute a defense to the said action, and wholly barren of any equities or claims of right in the defendant to entitle him to the relief sought, or to any equitable, legal, or other relief whatsoever.

X. Y., Attorney for Plaintiff.

§ 681. —— Grounds for sustaining or overruling

A motion for judgment on the pleadings should be denied where the pleadings raise a question of fact.[10] Hence a motion by plaintiff for judgment on the pleadings should be denied, where the

[7] C. E. Sharp Lumber Co. v. Kansas Ice Co., 142 P. 1016, 42 Okl. 689.

A motion for a judgment on the pleadings like a demurrer admits the truth of all well-pleaded facts in the pleadings of the opposing party. Deming Inv. Co. v. Reed (Okl.) 179 P. 35. A motion for judgment on the pleadings may be carried back and sustained against a prior pleading of the movant, and the court will consider the whole record and give judgment for the party who on the whole appears entitled to it. Id.

Motion for judgment on the pleadings admits for its purpose the truth of all the facts well pleaded by the opposite party. Griffin v. Oulp (Okl.) 174 P. 495.

[8] Smith v. Lundy, 173 P. 275, 103 Kan. 207.

[9] Mires v. Hogan (Okl.) 192 P. 811.

[10] Cobble v. Farmers' Nat. Bank of Tecumseh, Okl., 53 Okl. 814, 158 P. 364; Franklin v. Ward (Okl.) 174 P. 244; St. Louis & S. F. R. Co. v. Kerns, 136 P. 169, 41 Okl. 167; Noland v. Owens, 74 P. 954, 13 Okl. 408; Smith v. Jos. W. Moon Buggy Co. (Okl.) 169 P. 875; Chapman v. Tallant, 42 P. 61, 1 Kan. App. 799.

answer raises any issue of fact,[11] though by way of general denial,[12] unless there be an agreed statement of facts which contains some-

[11] It is error to sustain a motion for judgment on the pleadings, where there is on file, undisposed of, an answer of one of the defendants, setting forth that plaintiff is indebted to him on account in a sum in excess of plaintiff's demand. Stauffer v. Campbell, 30 Okl. 76, 118 P. 391.

Where the answer states a defense to a cause of action pleaded, it is error to render judgment for plaintiff on the pleadings and opening statement. Mascho v. Johnson, 49 Okl. 646, 153 P. 630; Mackey v. Boswell, 63 Okl. 20, 162 P. 193.

When it appears on the face of a note sued on that it is barred by the statute of limitations, and the only evidence that it is not barred consists in alleged promises in writing to pay, made within the statutory period, and such alleged promises are denied under oath, plaintiff is not entitled to a judgment on the pleadings; and the fact that defendant added, to said denial under oath, the plea of payment within the statutory period, is immaterial. Smith v. Beeler, 29 P. 1087, 48 Kan. 669.

Where, in an action on a note, an answer was filed alleging that the real owner of the note and the makers resided in different counties, and that the owner, to compel the makers to leave the county of their residence to defend the action, transferred it without consideration to plaintiff and caused him to commence an action against the makers and owner as indorser in the county in which he resided, it was error to render judgment on the pleadings against the makers on the ground that the answer did not state a defense to the note, for the facts stated showed that the court had no jurisdiction to hear the merits of the controversy. Freight v. Wyandt, 99 P. 611, 79 Kan. 309.

It is error to sustain a motion for judgment on the pleadings where the answer properly raised the bar of limitations and the statute of frauds and

[12] In replevin, answer by defendant, pleading general denial, and also affirmative defense admitting execution of note and mortgage on which claim for possession was based raises question of fact, so that judgment on pleadings is improper. Williams v. Gibson Bros., 60 Okl. 147, 159 P. 649.

A plaintiff who seeks to restrain a city of the first class from collecting a special tax on his property, on account of the cost of the improvement of a street upon which his property is situate, is not entitled to a judgment on the pleadings, when an answer by said city is on file, verified by the city attorney, that is in effect a general denial. McCrea v. City of Leavenworth, 27 P. 129, 46 Kan. 767.

Where in an action on an oral agreement to pay rent defendant filed a general denial, a motion for judgment on the pleadings was properly denied. Dunn v. Anderson, 51 Okl. 280, 151 P. 1045.

It is not error to deny judgment on the pleadings, where the answer is a general denial sufficient to put in issue all the averments of the petition. Barnes v. Davis, 30 Okl. 511, 120 P. 275.

Where two separate and well-pleaded causes of action are united in one petition, and a general denial is filed by the defendants, and also a good plea of a former adjudication as to one of the causes only, it is error for the court to sustain a motion for judgment on the pleadings as to both causes of action. Fouts v. Pettigrew, 74 P. 1107, 68 Kan. 289.

the existence of an oral contract without which plaintiff could not recover. Fox v. Ziehme, 30 Okl. 673, 120 P. 285.

In action on written contract for payment of money, alleging ownership of certain lease, a part of consideration for contract, wherein answer alleged failure of consideration and contained a general denial, judgment for plaintiffs on the pleadings was error. Lesem v. Harris, 102 Kan. 222, 169 P. 959.

In action on notes and to foreclose mortgage securing them, where defendant pleaded payment and was in default under an order to make his answer more definite and certain, sustaining of plaintiff's motion for judgment on the pleadings was error, in view of Rev. Laws 1910, § 4745, prescribing requisites of answer. Moore v. Continental Gin Co. (Okl.) 173 P. 809.

Where answer admitted execution of note but denied a holding in due course alleging that it was given on condition and negotiated in breach thereof to plaintiff, who took with knowledge, it was error to render judgment for plaintiff on pleadings. Dunkin v. Waurika Nat. Bank, 62 Okl. 175, 162 P. 788.

Where the answer in replevin contained several defenses in addition to a general denial, a motion for judgment on the pleadings was properly overruled. First State Bank of Mannsville v. Howell, 137 P. 657, 41 Okl. 216; Same v. Lawson, 137 P. 661, 41 Okl. 226.

A motion by plaintiff for judgment on the pleadings should be granted only when the answer does not deny, or state a defense to, a material allegation of the petition. Shipman v. Porter, 48 Okl. 265, 149 P. 901; Id., 48 Okl. 284, 149 P. 902.

Where material allegations of plaintiff's petition are denied by the answer and facts pleaded showing the same to be untrue, it is error to render judgment for plaintiff on the pleadings. Fenton v. Burleson, 124 P. 1087, 33 Okl. 230.

Plaintiff sued to recover an amount due on a contract to clean and crush zinc ore, which provided that plaintiff should sell to defendants his crushing plant and lease, but should retain the mill for 100 days to clean ore furnished by defendants, payment to be made for such work when the ore was sold, provided that if payment was not made as agreed, or if defendants failed to perform, plaintiff might retain any sum paid and withdraw the papers from escrow in satisfaction of the contract. It was also provided that plaintiff would execute bills of sale and an assignment of a lease to be placed in escrow, that the property should be free from all incumbrances, and the petition averred performance of all the conditions. The answer admitted the contract, the milling of the ore and alleged performance, and further alleged that plaintiff did not own the property when he agreed to sell it, and that he refused to place in escrow the bill of sale and assignment of the lease, and prayed recovery for an overpayment to plaintiff. Held, that a motion for judgment on the pleadings by plaintiff should have been overruled. Sparks v. McAllister, 103 P. 127, 80 Kan. 546.

In action for unliquidated damages, where answer admits breach of condition of bond sued on, but raises issue as to damages, motion of plaintiff for judgment on pleadings was improperly sustained. White v. Hocker, 58 Okl. 38, 158 P. 440.

thing fatal to defendant's recovery,[13] or the defenses or general denial contained in the answer are vitiated by admissions contained therein;[14] but should be granted where the petition states

[13] Where parties stipulated that certain statements were facts in the case reserving right to put in further evidence, plaintiff's motion for judgment on pleadings and findings could only be sustained if answer stated no defense, or if agreed facts contained something fatal to defendant's recovery. Coburn v. Simpson, 102 Kan. 234, 170 P. 383.

For purpose of plaintiff's motion for judgment on pleadings and findings, allegations of answer, unless contradicted by stipulation of parties as to facts, must be assumed to be true, though referred to in such stipulation. Coburn v. Simpson, 102 Kan. 234, 170 P. 383.

[14] When, under the allegations of the petition and the admissions in the answer, the plaintiff is entitled to judgment on the pleadings, it is error to deny a motion made for such purpose. Long v. Shepard, 130 P. 131, 35 Okl. 489.

Where defendant bases his counterclaim on a written contract for commissions for the sale of goods, but the contract provides for a sale outright to defendant, and no commissions are provided for therein, and no other defense is made, overruling of the motion for judgment on the pleadings is error. Page Woven Wire Fence Co. v. Allen, 31 Okl. 155, 120 P. 638.

Ordinarily a judgment for plaintiff on the pleadings cannot be ordered, where issue is joined upon a general denial and other defenses, unless the general denial is overthrown by other statements in the answer. Cobe v. Coughlin Hardware Co., 112 P. 115, 83 Kan. 522, 31 L. R. A. (N. S.) 1126.

Where defendant's answer contained a general denial, which, however, was qualified by other allegations admitting all facts necessary to authorize a judgment in plaintiff's favor, it was not error to sustain plaintiff's motion for judgment on the pleadings. Oliphant v. Crane (Okl.) 172 P. 1073, 1074; Schuber v. McDuffee (Okl.) 169 P. 642.

An answer containing a general denial and also a negative pregnant constituting admission of liability by defendant is subject to a motion for judgment in the pleading. Marshall Mfg. Co. v. Dickerson, 55 Okl. 188, 155 P. 224.

Where the admitted facts showed that the organization of a consolidated district was void, the court properly entered judgment on the pleadings, declaring the district void and that the persons acting as its officers were without legal rights, and decreeing dissolution of the district. Smith v. State, 47 Okl. 682, 149 P. 884.

Where the petition states a cause of action and, aside from the general denial, the answer admits facts entitling plaintiff to recover, judgment on pleadings is proper. Acton v. Culbertson, 38 Okl. 280, 132 P. 812.

Where the essential averments of a petition in an action for compensation as a real estate broker are a contract and a compliance therewith, and the answer, after a general denial, recognizes the procurement of a purchaser and an acceptance by the landowner and the execution of a valid contract of sale, and an agreement to compensate the brokers in accordance with the contract a motion by plaintiffs for judgment on the pleadings was properly sustained. Yoder v. Randol, 83 P. 537, 16 Okl. 308, 3 L. R. A. (N. S.) 576.

a cause of action and the answer fails to set up any legal defense,[15] or cross-complaint.[16]

A motion by defendant for judgment on the pleadings should

[15] Baker v. Gaines Bros. Co. (Okl.) 166 P. 159; Mires v. Hogan (Okl.) 192 P. 811.

In action on contract for sale of wheat, held that plaintiff was entitled to judgment on the pleadings. Cargill Commission Co. v. Mowery, 161 P. 634, 99 Kan. 389, judgment modified on rehearing 162 P. 313, 99 Kan. 389.

Plaintiff sued to foreclose a mortgage in the form of a warranty deed. The answer admitted that the deed was executed to secure an extension of a note and mortgage which was surrendered to defendants and to enable the mortgagor to avoid the payment of taxes. There was no plea of payment. Held to authorize judgment on the pleadings. Johnson v. Harvey, 112 P. 108, 83 Kan. 471.

In action for unpaid installments on an article sold under contract binding buyer to execute notes as evidence of indebtedness, answer not pleading any consideration for modification of contract stated no defense, and authorized judgment for plaintiff on the pleadings. Miles v. Grosman Co. (Okl.) 173 P. 808.

Where a copy of a negotiable note sued on and attached to the petition shows an undated indorsement, and defendant indorsee does not deny the indorsement under oath or plead facts showing that plaintiff took with knowledge of infirmities, plaintiff is entitled to judgment on the pleadings. Mangold & Glandt Bank v. Utterback, 54 Okl. 655, 160 P. 713, L. R. A. 1917B, 364.

Where a petition alleges defects in a note by mutual mistake, and the answer admits the defects, it is not error to render judgment on the pleadings reforming the same. De Groat v. Focht, 131 P. 172, 37 Okl. 267.

Where the pleadings aver that a citizen of the Creek Nation, by a clause in a deed executed prior to Act April 26, 1906, § 19, and before the restrictions were removed from the allotment of the grantor, agreed to execute a conveyance when his restrictions were removed, and such agreement is attached to the petition as a part thereof, and its execution is not denied, and it is averred that after removal of the restrictions the grantor executed a deed pursuant to the stipulation, the latter deed is void; and judgment to that extent should be entered for plaintiff on the pleadings. Long v. Shepard, 130 P. 131, 35 Okl. 489.

In replevin to recover certain chattels by virtue of a mortgage the answer setting up only a partial failure of consideration judgment was properly entered for plaintiff. Jones v. Bostick, 129 P. 718, 35 Okl. 363.

In an action on a note, indorsed before maturity, where the unverified answer contains a general denial, a denial of ownership, and an allegation of fraud, but sets up no counterclaim, plaintiff is entitled to judgment on the pleadings. Rose v. Boyer, 141 P. 1006, 92 Kan. 892.

[16] Where the allegations of a complaint as amended are admitted by the answer, and affirmative matter is filed as an answer and cross-complaint, on a motion for judgment on the pleadings the same should be rendered for plaintiff, if the allegations of the cross-complaint are insufficient to sustain a judgment for defendant. Pugh v. Stigler, 97 P. 566, 21 Okl. 854.

likewise be denied, where the pleadings raise any issue of fact,[17] which, if decided in plaintiff's favor would entitle him to any legal

[17] Where an answer states a defense to plaintiff's cause of action and plaintiff files a verified reply putting in issue the existence of such facts, it is error to render judgment on the pleadings. Goodman v. Broughman, 136 P. 420, 39 Okl. 585.

Allegations in pleadings of defendant that no summons was served in the case in which the judgment was rendered, though insufficient when standing alone, if coupled with averments of fraud and collusion extraneous to the issues in the case in which the judgment was rendered, were sufficient on motion by defendants for judgment on the pleadings. Griffin v. Culp (Okl.) 174 P. 495.

In an action on a note, it is error to render judgment in favor of defendant on the pleadings where the answer fails to set up a complete defense. McCormick Harvesting Machine Co. v. Koch, 58 P. 626, 8 Okl. 374.

Where court, on motion for leave to amend subcontractor's statement for lien filed as an exhibit to petition, found that owner was known by name to be inserted by amendment, judgment on pleadings for defendant was error. Badger Lumber Co. v. Collinson, 156 P. 724, 97 Kan. 791.

In ejectment, plaintiff claimed to be the owner and entitled to possession. Defendants, in their cross-petition, denied plaintiff's ownership and alleged that a third person was the owner and that she had executed an oil and gas lease to defendants under which they were in possession. Plaintiff filed a general denial to the cross-petition and reaffirmed his ownership. Held, that the court could not enter judgment for defendants on the pleadings; it being necessary to determine the issue of ownership in order to decide the rights of the parties. McCready v. Dennis, 85 P. 531, 73 Kan. 778.

Where the petition states a cause of action and the answer alleges no new matter, rendition of judgment for defendant on the pleadings is improper. Leighton v. Crowell, 60 Okl. 219, 159 P. 1119.

A reply denying each allegation in the answer inconsistent with the allegations of the petition, without motion to make it more definite or other attack which would give the pleader opportunity to amend, is sufficient to put in issue allegations of defensive new matter in the answer, and judgment on the pleadings based thereon is properly denied. Stone v. Stone (Okl.) 168 P. 423.

Reply to an answer setting up a judgment in bar, containing a general denial of matters in answer, and alleging facts intended to avoid the judgment, was an admission of existence of judgment, and where affirmative facts were not legally sufficient to defeat the bar, judgment on the pleadings was proper. Glacken v. Andrew (Okl.) 169 P. 1096.

Where, in action on note, the answer admitted execution by several defendants, and oral agreement to receive a fixed sum as defendant's liability and payment thereof and a reply denied allegations of answer as "inconsistent" with petition, motion by defendant for judgment on the pleadings was properly denied where no motion to make the reply definite and certain was made. Lambert v. Sloop, 58 Okl. 289, 159 P. 482.

In action for rent collected by plaintiff's agent, held, on the petition, answer and cross-petition, and the reply alleged to be improperly verified, it was

or equitable relief,[18] as where the petition states a cause of action and the answer does not constitute a complete defense thereto,[19] though no reply has been filed,[20] but should be granted where the

not error to refuse to render judgment for defendant upon the pleadings. Harn v. Boyd (Okl.) 170 P. 505.

Where plaintiff alleged that he had repaid the beneficiary for premiums advanced and made further advancements on consideration of being substituted as beneficiary, held, that it was error to render judgment for a claimant to the fund adverse to plaintiff, without receiving all the evidence and determining the cause on equitable considerations. Brown v. Modern Woodmen of America, 156 P. 767, 97 Kan. 665, L. R. A. 1916E, 588.

[18] A motion for a judgment for defendant on the pleadings will not be sustained where, on any or all the pleadings in the case, taken together, facts are stated which show that plaintiff is entitled to some legal or equitable relief. Hawkins v. Overstreet, 54 P. 472, 7 Okl. 277.

Plaintiff filed a petition alleging title to land through a railway company, and that defendants took forcible possession under a pretended homestead entry, and by false representations secured a settlement whereby he gave them $400 in cash and his note for $600 to obtain a relinquishment of their title, and asked judgment for $400. Defendants filed a general denial, and set up title to the land under their homestead entry. Plaintiff replied, attacking the bona fides of the homestead entry. Held, that a judgment for defendants on the pleadings was erroneous, since the plaintiff had a right to present to the jury the question of the good faith of the homestead entry. Tessendorf v. Lasater, 61 P. 328, 9 Kan. App. 885.

Since a plea of former adjudication presents an issue of fact, a party pleading same is not entitled to judgment on the pleadings by reason thereof. Johnson v. Johnson, 143 P. 670, 43 Okl. 582.

[19] Where plaintiff's petition states a cause of action, and defendant's answer does not constitute a complete defense thereto, it is error to render judgment for defendant on the pleadings. Sweet v. Crane, 39 Okl. 248, 134 P. 1112.

Where, in a materialman's action to enforce a lien, the petition states a cause of action for wrongful conversion, defendant's motion for judgment on the pleadings should be denied, though the petition does not show plaintiff entitled to enforce the lien, and though the prayer be only for such enforcement. C. E. Sharp Lumber Co. v. Kansas Ice Co., 142 P. 1016, 42 Okl. 689.

[20] Where petition seeks cancellation of conveyance because never executed by plaintiffs, and that being a full-blood conveyance of inherited lands, it was never approved by the county court, and answer contained general denial and allegations of execution and approval of conveyance, judgment on the pleadings should not be entered for failure to reply. Robert v. Mullen, 61 Okl. 40, 160 P. 83.

An allegation in the answer that plaintiff, assignee of the note sued on, paid nothing for the note, held not to state a defense, and not to call for a reply so as to permit judgment on the pleadings for want of reply. Owens v. Farmers' & Merchants' Bank of Duke, 54 Okl. 387, 154 P. 355.

Where, if claim of plaintiff was true, defendant was not entitled to judgment on its cross-petition, defendant's motion for judgment on the pleadings after all of the evidence had been offered held properly overruled, though plaintiff filed no reply. Hoover v. Brookshire, 122 P. 171, 32 Okl. 298.

pleadings do not present any issue of fact which, if determined in plaintiff's favor, would warrant recovery by him,[21] particularly if plaintiff does not request leave to amend.[22]

[21] In action in replevin, consolidated with action by defendant therein for injunction, setting up right to replevied property under award, held, that trial court did not err in sustaining motion of defendant in first action, plaintiff in second action, for judgment on the pleadings. Scrivner v. McClelland (Okl.) 168 P. 415.

Where cattle were shipped under a written contract alleged in the answer providing that a failure to give notice of claims before removal of the cattle at destination and within one day after delivery should bar the shipper's right to recover on claims with reference thereto, and neither the petition nor the reply alleged a compliance with such condition nor waiver thereof, and no facts were pleaded showing an actual or substantial compliance with the provision or excuse for failure to do so, defendant was entitled to judgment on the pleadings. St. Louis & S. F. R. Co. v. Cake, 105 P. 322, 25 Okl. 227.

A petition to foreclose a subcontractor's lien under the mechanic's lien law failed to allege that notice of the filing of the lien had been served on the owner. More than a year after the lien was filed the petition was amended to allege service of notice. A motion for judgment on the pleadings was denied, and an objection to evidence under the amended pleading overruled. Held error. Powers v. Badger Lumber Co., 90 P. 254, 75 Kan. 687.

Where the reply to an answer setting up a discharge in bankruptcy, in addition to a general denial, alleged particular but insufficient facts to avoid the effect of the discharge, held, that a judgment on the pleadings was proper, notwithstanding the general denial. Chambers v. Kirk, 139 P. 986, 41 Okl. 696.

Where a petition in an action on the bond of a justice of the peace alleges the collection of moneys by the principal as justice, and the answer admits the execution of the bond, and alleges that the moneys were collected under a contract between plaintiff and the justice, so pleaded as to require a verified denial, and the contract shows on its face that it is illegal and void as against public policy, and the reply filed is an unverified general denial, the legal effect of the contract is admitted, and defendant is entitled to judgment on the pleadings. Limerick v. Barrett, 43 P. 853, 3 Kan. App. 573.

[22] Where an action is brought against a railroad for injury to horses shipped, and the petition alleges that they were shipped under a written contract, evidenced by bill of lading attached to the petition and made a part thereof, and said bill of lading provides for notice within 30 hours of any damage in transit, and there is written across the face of the bill of lading "released per contract," and this contract is referred to in the answer of defendant and attached as an exhibit, and contains provision that as a condition precedent to recovery notice shall be given in writing to the railroad company or its officers before the stock is removed from the place of shipment, and it is alleged that this provision of the contract has not been complied with, and plaintiff files a reply setting up a general denial, which is unverified, the written contract is admitted, and where neither the petition nor the reply alleges a compliance with conditions of the bill of lading or contract, nor any allegation of waiver, and no facts are set up in the pleadings as to compliance,

Where the execution of a written contract is alleged and relied on in a petition, counterclaim, or set-off, a verified denial thereof must be contained in the answer or reply; otherwise, the allegation as to the execution of the instrument will be taken as true at the hearing on a motion for judgment on the pleadings.[23] The same is true where the plaintiff or defendant, as the case may be, relies on a verified account to which no verified denial is filed,[24] providing the correctness of the account is alleged in the body of the pleading.[25]

Where plaintiff alleged a shipment under a definite verbal con-

a motion for judgment for defendant on the pleadings should be sustained, where there is no request by plaintiff to amend. St. Louis & S. F. R. Co. v. Phillips, 87 P. 470, 17 Okl. 264.

[23] Where, in an action on a note, the answer denying its execution is filed unverified, but was sworn to by defendant before the clerk of the court on the day the case is called for trial without leave of court first obtained, while the answer remains on file, it is error to render judgment against defendant on the pleadings. Manning v. Stroud State Bank, 110 P. 650, 26 Okl. 625.

In action on note wherein answer is not verified and does not allege any set-off or counterclaim or legal defense, judgment on the pleadings may be entered for plaintiff. Kerr v. McKinney (Okl.) 170 P. 685.

In action to enforce policy as it was alleged to have been before being wrongfully changed, where defendant alleged execution as shown by copies attached and reply was not verified, defendant was entitled to judgment on pleadings, under Code Civ. Proc. Kan. § 110 (Gen. St. Kan. 1909, § 5703). Hayes v. Mutual Benefit Life Ins. Co., 158 P. 1107, 98 Kan. 584.

Where defendants pleaded the execution of a note and mortgage, and asked judgment thereon and foreclosure, and plaintiff replied by an unverified denial, judgment should have been rendered for defendants on the note and mortgage. Brewer v. Martin, 138 P. 166, 40 Okl. 350.

[24] An action was brought upon an account, the correctness of which was verified by affidavit. Defendants filed a verified answer, conceding the account, but stating that they purchased drafts from a banking firm of which plaintiff was a partner, and that the drafts were dishonored, and they were compelled to redeem the same. The amount of the indebtedness thus arising exceeded plaintiff's claim, and defendants demanded judgment for the difference. Plaintiff replied with a verified denial of the allegations of the answer. Both parties declined to offer evidence, and submitted the case upon the pleadings, and judgment was rendered for plaintiff for the amount of his account. Held that, though the counterclaim was good, the judgment was proper, since it was denied under oath and no proof was offered. Hatfield v. Farnum, 29 P. 395, 48 Kan. 126.

[25] Where bill of particulars does not allege correctness of the account sued on, and is unverified, plaintiff is not entitled to judgment on the pleadings, though a verified statement of account be attached to the bill. Barnes v. Universal Tire Protector Co., 63 Okl. 292, 165 P. 176.

tract, and defendant answered by general denial and by pleading a written contract which it alleged was the only one between the parties, the overruling of defendant's motion for judgment on the pleadings, because the reply containing a general denial of new matter was unverified, was not error.[26]

Where defendant in his answer, in addition to the general denial, pleads facts warranting affirmative relief, and after filing such answer, but before reply, plaintiff, by leave of court, dismisses, defendant will be allowed to pursue his remedy for affirmative relief as set up in his answer, and on motion for judgment on the pleadings on the ground that the allegations for affirmative relief are undenied, the court should either sustain the motion or rule plaintiff to reply to the affirmative part of the answer, so that the issue may be raised and tried by the court.[27]

A reply, denying the allegations of the answer inconsistent with the petition, denies all defenses to the cause of action alleged in the petition, so as not to entitle defendant to judgment on the pleadings.[28]

Where the answer raises an issue of fact and both parties move for judgment on the pleadings, it is error to grant plaintiff's motion.[29] Defendant, by moving for judgment on the pleadings, does not waive his right to have an issue of fact set out in his answer, tried by the court or by a jury.[30]

Motions for judgment on the pleadings cannot be sustained, unless the court can determine on the pleadings the rights of the parties and pronounce judgment final between them.[31]

Where a question of fact is involved, it is proper for the court to set aside its judgment on the pleadings.[32]

[26] Atchison, T. & S. F. Ry. Co. v. Moore, 129 P. 24, 36 Okl. 433; Atchison, T. & S. F. Ry. Co. v. Robinson, 129 P. 20, 36 Okl. 435.
[27] Brown v. Massey, 92 P. 246, 19 Okl. 482.
[28] McKnight v. Strasburger Bldg. Co., 150 P. 542, 96 Kan. 118.
[29] Atwood v. Massey, 54 Okl. 178, 153 P. 629.
[30] Id.
[31] White v. Hocker, 58 Okl. 38, 158 P. 440.
[32] Chamberlain Metal Weather Strip Co. v. Bank of Pleasanton, 160 P. 1138, 98 Kan. 611.

§ 682. —— Departure

A departure in the reply from the petition cannot be taken advantage of by motion for judgment on the pleadings, but can only be reached by a motion to strike.[33]

§ 683. —— Judgment against verdict

While judgment may be given for a party on the pleadings even after verdict against him, his right thereto should clearly appear from the pleadings, and where the pleadings present material issues of fact not determinable without evidence aliunde a motion for judgment on the pleadings is properly overruled.[34]

§ 684. Motion to strike from files—Form

"Motions to strike pleadings and papers from the files may be made with or without notice, as the court or judge may direct." [35]

Like a demurrer, a motion to strike a pleading admits the truth of all facts well pleaded for the purposes of the motion, except where the motion is to strike the pleading as a sham.[36] While in some cases the granting or refusing of a motion to strike rests in the sound discretion of the trial court, the court must not act arbitrarily. The discretion referred to contemplates a legal discretion, a discretion to be exercised in discerning the course prescribed by law according to legal principles.

Motions to strike pleadings for any cause are not to be encouraged, and will be granted only in a clear case. A motion to strike a pleading as an entirety, or several separate paragraphs of a pleading, cannot be sustained, where one or more of the paragraphs are sufficient.[37]

Where objections to a pleading are based on its insufficiency in

[33] St. Paul Fire & Marine Ins. Co. v. Mountain Park Stock Farm Co., 99 P. 647, 23 Okl. 79; Wilson v. Jones (Okl.) 168 P. 194.

[34] Curtis & Gartside Co. v. Pigg, 39 Okl. 31, 134 P. 1125; Rev. Laws 1910, § 5140.

[35] Rev. Laws 1910, § 5315.

[36] Turk v. Page (Okl.) 174 P. 1081.

[37] Turk v. Page (Okl.) 174 P. 1081.

Considered as a permissible pleading, it was error to strike from an answer eight separate paragraphs thereof, where one or more of such paragraphs of the defenses interposed was sufficient. Turk v. Page (Okl.) 174 P. 1081.

matters of substance, they should be taken by demurrer, and not by motion to strike.[38]

MOTION TO STRIKE ANSWER FROM FILES

(Caption.)

Comes now the plaintiff and moves the court to strike from the files herein the answer filed by the defendant, upon the ground that said answer is not verified (or is defectively verified, in this, specifying the defect).

———, Attorney for Plaintiff.

§ 685. —— Affirmative pleading

A motion to strike out an affirmative pleading is not an appropriate method of testing its sufficiency;[39] the proper remedy being by demurrer,[40] or by objection to the introduction of any evidence under it.[41]

A motion to strike a petition from the files for impertinent, immaterial, libelous, and scandalous matter, should not be sustained, where the petition contains facts which, if true, would constitute a valid basis for judgment.[42]

§ 686 —— Defensive pleadings

Where the answer fails to state a defense to the action or any part thereof, a motion to strike the answer should be sustained.[43]

Where the defendant's answer and cross-petition alleges that an account was a joint liability against the plaintiff and third party, plaintiff's agent, and its correctness is denied by an affidavit of the agent in the reply, a refusal to strike the reply for want of

[38] Hailey v. Bowman, 137 P. 722, 41 Okl. 294.

[39] Grand Lodge I. O. O. F. of State of Kansas v. Troutman, 84 P. 567, 73 Kan. 35.

[40] Where objections to a pleading are based on its insufficiency in matters of substance, they should be taken by demurrer, and not by motion to strike. Hailey v. Bowman, 137 P. 722, 41 Okl. 294.

It is improper to strike out an answer and cross-petition because the facts stated therein are insufficient to establish a cause for relief, the proper practice being to demur. Armstead v. Neptune, 44 P. 998, 56 Kan. 750.

[41] Objection to a petition on the ground that it does not state facts sufficient to constitute a cause of action can be made only by demurrer or objection to evidence, and cannot be raised by motion to strike the petition from the files. First Nat. Bank v. Cochran, 87 P. 855, 17 Okl. 538.

[42] Butler v. Butler, 125 P. 1127, 34 Okl. 392.

[43] National Life Ins. Co. v. Hale, 54 Okl. 600, 154 P. 536, L. R. A. 1916E, 721.

proper verification is not error, particularly where the purported account is not in fact an account; it not constituting a proper counterclaim or set-off.[44] Where the defendant has filed an answer, good in form, to which a reply has been filed, he cannot be compelled, to avoid having the answer stricken as a sham, to give an affidavit or deposition before a notary public, to be used on the hearing of a motion to strike from the files the answer as false and a sham.[45]

If the amended reply is filed, and the defendant is not prepared to proceed with the trial, his remedy is to apply for a continuance, not to move to strike the amended reply.[46]

§ 687. —— Demurrer

The striking of the demurrer of one defendant from the files, instead of permitting it to be amended, was not an abuse of discretion, where such defendant, being in default, obtained leave to plead, and was represented by the same attorney as his codefendant, who had filed a demurrer on the same grounds, which demurrer had been previously overruled.[47]

§ 688. —— Departure

An objection to a pleading on the ground of departure must be raised by motion to strike,[48] not by motion for judgment on the pleadings.[49]

§ 689. —— Limitations

The question whether an action was barred by limitations cannot be raised by a motion to strike the petition from the files.[50]

[44] Harn v. Boyd (Okl.) 170 P. 505.

[45] In re Bartholomew, 21 P. 275, 41 Kan. 273.

[46] Bly v. Pool, 60 Okl. 77, 159 P. 511.

[47] Burr v. Honeywell, 51 P. 235, 6 Kan. App. 783.

[48] Wilson v. Jones (Okl.) 168 P. 194; Merchants' & Planters' Ins. Co. v. Marsh, 125 P. 1100, 34 Okl. 453, 42 L. R. A. (N. S.) 996.

Departure held ground for striking out a reply. Springfield Fire & Marine Ins. Co. v. Halsey, 126 P. 237, 34 Okl. 383.

A refusal to strike from the files an amended petition, as a departure from the original petition, is not ground of reversal on appeal where no objectionable departure appears, nor any abuse of its discretion by the trial court. Leroy & C. V. A. L. R. Co. v. Small, 26 P. 695, 46 Kan. 300.

[49] Wilson v. Jones (Okl.) 154 P. 663; Stuart v. Grayson (Okl.) 162 P. 956.

[50] Baldwin v. Ohio Tp., 65 P. 700, 63 Kan. 885.

§ 690. —— Amended pleading

A motion to strike out a pleading may be used to eliminate an amended pleading which is a mere repetition of one held defective on demurrer; but where an amended petition sets forth additional facts and a fuller statement of those alleged in the original petition, and made in the bona fide effort to state a cause of action, a motion to strike out because of sameness to the original petition will not lie.[51]

Where an amended answer measurably complies, in particulars required, with an order that the original be made more definite and certain, it is error to sustain a motion to strike the amended answer from the files, though it may not state facts sufficient to constitute a defense; but a demurrer, so that an amendment can be allowed, is the proper pleading.[52]

However, where parties obtain leave to amend to make it more definite and certain and the amendment fails to do so, the amendment is properly stricken.[53]

The striking of an amended pleading leaves the original pleading standing, as though no amendment had been filed.[54]

§ 691. —— Failure to amend

Where an answer on file states a defense and defendant is in default of an order to make his answer more definite and certain, the proper procedure is by motion to strike the answer.[55]

§ 692. Motion to strike from pleading—Form

"If redundant or irrelevant matter be inserted in any pleading, it may be stricken out, on motion of the party prejudiced thereby." [56]

[51] Grand Lodge I. O. O. F. v. Troutman, 84 P. 567, 73 Kan. 35.

Where the original petition was sufficient, there was no error in refusing to strike from the files an amended petition, which in no way changed the cause of action. Chicago, K. & W. Ry. Co. v. Totten, 42 P. 269, 1 Kan. App. 558.

Where the original and two amended petitions prayed for equitable relief, it was error to sustain a motion to strike the last amended petition from the files, as changing the action from one in tort to an action in equity. Baldwin v. Ohio Tp., 65 P. 700, 63 Kan. 885.

[52] McNinch v. Northwest Thresher Co., 100 P. 524, 23 Okl. 386, 138 Am. St. Rep. 803.

[53] Long v. McFarlin, 58 Okl. 321, 159 P. 653.

[54] St. Francis Land & Abstract Co. v. Rathburn, 114 P. 862, 84 Kan. 664.

[55] Moore v. Continental Gin Co. (Okl.) 173 P. 809.

[56] Rev. Laws 1910, § 4770.

In action by creditor, after alleged rescission of settlement by debtor's con-

It is proper to strike from a petition on motion mere surplusage,[57] irrelevant[58] and immaterial allegations calculated to prejudice defendant,[59] matter in avoidance of an anticipated defense,[60] copies, the originals of which are not signed by the defendant or his agent,[61] allegations specially pleading punitive damages in a sum certain, where it is not required that such damages be specially pleaded.[62] Likewise redundant and irrelevant matter may be stricken from an answer.[63]

structive delivery of goods, debtor's claim for damages for malicious prosecution of former civil action held properly stricken; there being no basis for a claim that the action was brought maliciously and without probable cause. United States Tire Co. v. Kirk, 102 Kan. 418, 170 P. 811.

[57] In petition to cancel deeds by full-blood Indians and quiet title on ground that county court was without jurisdiction to approve the deeds, and that they were void and not supported by consideration, allegations that consideration named was never paid held surplusage and properly stricken. Long v. McFarlin, 58 Okl. 321, 159 P. 653.

Where facts in a petition are redundant and surplusage and could be proven without being pleaded, it is within the discretion of the court to strike out or retain them. Sramek v. Sklenar, 85 P. 566, 73 Kan. 450.

[58] It is not error, on motion of defendant, to strike irrelevant matter from plaintiff's petition. Grand Lodge K. P. of North America, etc., v. Farmers' & Merchants' Bank of Boley, 64 Okl. 225, 166 P. 1080.

[59] Roe v. Board of Com'rs of Elk County, 40 P. 1082, 1 Kan. App. 219.

When a petition contains redundant or irrelevant allegations, calculated to prejudice defendant on the trial, the same should be stricken out on motion. Roe v. Board of Com'rs of Elk County, 40 P. 1082, 1 Kan. App. 219.

In action for partition of land in this state, where amended petition made stranger to title a party, alleging that he claimed title to plaintiff's land in another state and wrongfully excluded plaintiff from possession, motion by another defendant claiming interest in Kansas lands to strike averments as to new defendant, etc., was properly sustained. Caldwell v. Newton, 163 P. 163, 99 Kan. 846.

[60] When a complaint sets up matter in avoidance of a plea of res judicata which plaintiff anticipates may be made by defendant, that matter is properly stricken out. Frick Co. v. Carson, 43 P. 820, 3 Kan. App. 478.

[61] Certain copies of letters held properly stricken from the petition, in an action for services, where they were not signed by defendant, or by any person authorized by him to sign them. Van Doren v. Altoona Portland Cement Co., 141 P. 560, 92 Kan. 470.

[62] Where in the ad damnum damages are claimed generally in a sum certain, and exemplary damages as such are claimed also in a sum certain, motion to strike the latter item was properly sustained; it being unnecessary that punitive damages should be specially pleaded. Acton v. Culbertson, 38 Okl. 280, 132 P. 812.

[63] An order striking out parts of an answer, but leaving sufficient to present all proper defenses and counterclaims, held not error. Stroupe v. Hewitt, 133 P. 562, 90 Kan. 200.

In action for damages for conversion of goods by bailee, striking from his

It is error, however, to strike out certain portions of a petition unless such parts are statements of matter foreign to the cause, and raise no issue proper to be raised in the case, and unless such motion is made by the party prejudiced.[64]

It is not error to refuse to strike out the statement of a legal conclusion from a pleading, where the facts on which such statement rests are fully set out.[65]

In an action for breach of marriage promise, it is not error to overrule a motion to strike out of the petition evidential facts forming no part of the cause of action, but which are pleaded as aggravation of damages.[66]

An allegation in a reply at variance with the petition should be stricken on motion.[67]

MOTION TO STRIKE PORTION OF PLEADING

(Caption.)

Comes now the above named defendant, C. D., and moves the court to strike from the petition of the plaintiff heretofore filed herein the following statements and allegations, to wit:

1. That portion of the ——— and ——— lines of paragraph numbered ——— of said petition, reading as follows: (Set forth portion of petition concerned) for the reason that the same is irrelevant and immaterial and a legal conclusion.

2. That portion of the last ——— line of paragraph numbered ——— of said petition, reading as follows: (Setting same forth)

answer statements amounting to reasons for conversion was not error, where the facts had no bearing on question of liability. United States Tire Co. v. Kirk, 102 Kan. 418, 170 P. 811.

[64] Berry v. Geiser Mfg. Co., 85 P. 699, 15 Okl. 364.

It is not error for the court to overrule a motion to strike out parts of petition not statements of redundant or irrelevant matter, but germane to the issues. Crump v. Lanham (Okl.) 168 P. 43.

In action to recover twice the amount of usurious interest paid, overruling motion to strike certain parts of petition relating only to renewal notes of original notes, was not error, where action was brought within two years from maturity of last renewal note. Citizens' State Bank of Ft. Gibson v. Strahan, 63 Okl. 288, 165 P. 189, modifying judgment on rehearing 59 Okl. 215, 158 P. 378.

[65] State Bank of Stockton v. Showers, 70 P. 332, 65 Kan. 431.

[66] Sramek v. Sklenar, 85 P. 566, 73 Kan. 450.

[67] Gage v. Connecticut Fire Ins. Co. of Hartford, Conn., 127 P. 407, 34 Okl. 744.

for the reason that the same is irrelevant, immaterial, and surplusage.

3. That portion of paragraph numbered ——— of said petition reading as follows: (Setting same forth) for the reason that the same is irrelevant, immaterial, a repetition, and surplusage.

———, Attorney for Defendant.

§ 693. —— Motion to strike parties—Form

Where plaintiff has joined unnecessary parties with him, the proper practice is a motion to strike such parties from the petition, rather than a motion to strike the petition from the files.[68]

MOTION TO STRIKE PARTIES

(Caption.)

Comes now the above named defendant, C. D., and moves the court to strike the name of the plaintiff, E. F., from the petition herein, and from this action, for the reason that said plaintiff has no interest in this action and is an unnecessary and improper party plaintiff.

X. Y., Attorney for Defendant.

§ 694. Motion to make more definite and certain

"When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment." [69]

Under this statute, it is only where the allegations of a pleading are so indefinite and uncertain that the precise nature of the action or defense is not apparent that the court may require a party to make his petition or answer more definite and certain.[70]

[68] Maddin v. Robertson, 38 Okl. 526, 133 P. 1128.

[69] Rev. Laws 1910, § 4770.

[70] Moore v. Continental Gin Co. (Okl.) 173 P. 809.

It is not error to overrule a motion to make a pleading more definite where it is sufficient to inform the opposing party of the precise charge or defense. Eisminger v. Beman, 124 P. 289, 32 Okl. 818.

Where the answer set up a large number of items which defendant alleged were owing him by plaintiff and alleged that plaintiff, at the execution of the note and mortgage, was indebted to defendant in a larger sum than that named in the note, and the reply alleged that at the date of the execution of the note and mortgage there were other matters of mutual account between the plaintiff and defendant, and that on that date the plaintiff and defendant mutually agreed that all obligations between them, except the note and mort-

This statute does not authorize the court to require a party to plead his evidence,[71] or to supply omitted matters which would give the opposite party an opportunity to demur.[72]

The motion is addressed to the trial court's sound discretion,[73] but should be sustained where the statutory grounds clearly ap-

gage should be extinguished and satisfied, a motion to make the reply more definite and certain was properly overruled. Hutchings v. Cobble, 30 Okl. 158, 120 P. 1013.

A petition in an action for conversion held sufficient as against an objection to evidence, in absence of a motion to make more definite and certain, where it advised defendant of the nature of plaintiff's claim. Farmers' & Merchants' Nat. Bank v. Gann, 148 P. 249, 95 Kan. 237.

Where in an action for death of an employé, it appeared that the intestate's fellow employés knew how he was killed, and before the trial all the evidence offered by plaintiff relating to the occurrence was taken by deposition, so that defendant had full knowledge of the facts, it was not reversible error to overrule a motion to require general allegations of the petition as to negligence to be made more definite. St. Louis & S. F. Ry. Co. v. French, 44 P. 12, 56 Kan. 584.

Where a petition in a personal injury case alleges a specific act of negligence by one of three designated agents of the defendant, it is not subject to a motion to make the allegation more definite by pointing out the particular agent, where it is also averred that plaintiff has no further information. Atchison, T. & S. F. Ry. Co. v. Davis, 79 P. 130, 70 Kan. 578.

The fact that a petition setting forth a specific cause of action contains general allegations did not render erroneous the overruling of a motion to make more definite and certain, where the court treated the general allegations as surplusage, and confined plaintiffs to the specific cause of action. Dwelle v. Dwelle, 40 P. 825, 1 Kan. App. 473.

It is proper to overrule a motion to make a petition more definite and certain, made long after the issues were joined, and only when the case is called for trial, where the petition is fully traversed, has not been otherwise assailed, and is not clearly misleading. Phœnix Ins. Co. of Brooklyn v. Arnoldy, 47 P. 178, 5 Kan. App. 174.

[71] Moore v. Continental Gin Co. (Okl.) 173 P. 809; Shawnee Life Ins. Co. v. Taylor, 58 Okl. 313, 160 P. 622; Scott v. Shewell, 164 P. 1061, 100 Kan. 466.

Motion to require petition to be made more definite and certain by setting out evidentiary facts is properly denied, where ultimate facts are alleged. Jackson v. Uncle Sam Oil Co. of Kansas, 156 P. 756, 97 Kan. 674.

[72] Liston v. Nail, 63 Okl. 212, 164 P. 467.

[73] City of Lawton v. Hills, 53 Okl. 243, 156 P. 297; Frey v. Failes, 132 P. 342, 37 Okl. 297; Felt v. Westlake (Okl.) 174 P. 1041; Cribb v. Hudson, 160 P. 1019, 99 Kan. 65.

An order requiring a petition to be made more direct and certain will not be reversed, where there is a doubt as to the issue presented, or whether a cause of action is stated, or whether defendant is charged with notice of what he is required to defend against. Skelton v. Standard Inv. Co., 37 Okl. 82, 130 P. 562.

pear.[74] It lies only when the pleading is so uncertain that the charge or defense is not apparent, and does not relate to the refinements of common-law pleadings.[75] To be available, however, an objection to the generality or indefiniteness of a pleading should be raised by such a motion.[76]

Failure to attach to a petition a copy of the written instrument upon which the cause of action is based, should be challenged by motion.[77]

[74] A pleading containing only a general allegation of negligence is subject to a motion to make more definite and certain. Price v. Atchison Water Co., 50 P. 450, 58 Kan. 551, 62 Am. St. Rep. 625.

Where the petition in an action to recover unauthorized fees and money received by the board of county commissioners failed to show wherein the fees were illegal, and wherein the claim allowed by the commissioners for which he was alleged to have unlawfully received the money was unlawful, it was error to deny a motion to make the same more definite. Roe v. Board of Com'rs of Elk County, 40 P. 1082, 1 Kan. App. 219.

Where petition alleged that employer neglected to furnish safe means of passage to and from its brick kilns or running boards, and negligently removed cross-bricks from ditches, whereby employé going out of kiln accidentally stepped into hole in ditch and was injured, it was not error to require plaintiff to make his petition more definite and certain as to place of injury. Anderson v. Denison Clay Co., 104 Kan. 766, 180 P. 797.

Petition in action against outgoing clerk of county court and surety on his bond for moneys received during office, held insufficient as against motion to require petition to be made more definite and certain by setting forth sources of moneys and separate receipts and disbursements. Swarts v. State (Okl.) 174 P. 255.

Where allegations of a complaint for slander contain two separate causes of action and show that the slanderous words were spoken in the same conversation, defendant is entitled, on motion, to have the petition made more definite, to the end that he may not be tried on two causes of action, when but one exists. Thompson v. Harris, 67 P. 456, 64 Kan. 124, 91 Am. St. Rep. 187.

A petition alleged that a copy of an account attached as an exhibit, indicating merely dates and sums of money, generally represented grain sold and delivered. There was nothing indicating the quantity or kinds of grain, or which items referred to grain. Held, that a motion to make more definite should have been granted. Nash v. Denton, 51 P. 896, 59 Kan. 771.

[75] Board of Com'rs of Republic County v. United States Fidelity & Guaranty Co., 150 P. 590, 96 Kan. 255.

[76] Engelbrecht v. Herrington, 172 P. 715, 101 Kan. 720, 103 Kan. 21, L. R. A. 1918E, 785; Board of Com'rs of Neosho County v. Spearman, 130 P. 677, 89 Kan. 106.

[77] Incorporated Town of Sallisaw v. Chappelle (Okl.) 171 P. 22; Rev. Laws 1910, § 4769.

Where a petition alleges a contract for sale of lands, made between plain-

§ 695. —— Form and requisites

A motion to make a pleading more definite, which fails to point out wherein it is indefinite, is properly overruled.[78]

MOTION TO MAKE MORE DEFINITE AND CERTAIN

(Caption.)

Comes now the above named defendant, A. B., and moves the court to require the plaintiff to make his petition filed herein more definite and certain in the following particulars, to wit: (Here set forth particulars in which petition should be more definite and certain.)

———, Attorneys for Defendant.

§ 696. —— Time of making

A motion made by defendant to require plaintiff to make his pleading more definite and certain is generally too late when not made until after the case is called for trial.[79] It may be made at any time within the period allowed to answer or demur, and, if defendant obtains an extension of time in which to plead, his right to make such motion is not waived, since the words "to plead" are not limited to the filing of an answer or demurrer, but include any pleading provided for by law.[80]

It was not an abuse of discretion to deny an application for leave to file, out of time, a motion requiring plaintiff to make his petition more definite and certain, where no showing was made by defendant that he had any valid defense.[81]

The motion may be heard, though filed by leave of court after defendant is in default.[82]

§ 697. —— Waiver—Dismissal

Failure to secure a ruling upon a motion to make the petition more definite and certain constitutes an abandonment and waiver

tiff and defendant's agent, and that the authority of the agent is in writing, it is not error to require plaintiff to set out a copy of such writing. Atwood v. Rose, 122 P. 929, 32 Okl. 355.

78 Grimes v. Cullison, 41 P. 355, 3 Okl. 268; Union Coal Co. v. Wooley, 54 Okl. 391, 154 P. 62.

79 St. Louis & S. F. Ry. Co. v. Snaveley, 28 P. 615, 47 Kan. 637.

80 St. Louis & S. F. R. Co. v. Young, 130 P. 911, 35 Okl. 521.

81 Horton v. Haines, 102 P. 121, 23 Okl. 878.

82 Anderson v. Denison Clay Co., 104 Kan. 766, 180 P. 797.

thereof.[83] Failure to comply with an order sustaining such motion authorizes dismissal of the action.[84]

§ 698. Motion to require pleader to separately state and number

A motion to separately state and number is addressed to the sound discretion of the trial court;[85] but where two or more causes of action are stated in the same petition, and not separately stated or numbered, it is error for the court to overrule a motion of the defendant to require the plaintiff to separately state and number the several causes of action stated in his petition.[86]

§ 699. —— Form and requisites

A motion to require causes of action to be separately stated and numbered should designate the matters constituting each separate cause.[87]

[83] Arnold v. Burks, 63 Okl. 273, 164 P. 970.

[84] Anderson v. Denison Clay Co., 104 Kan. 766, 180 P. 797.

[85] Cribb v. Hudson, 160 P. 1019, 99 Kan. 65.

[86] Provident Trust Co. v. Coron, 49 P. 345, 5 Kan. App. 431.

Under Code Civ. Proc. Kan. § 88, and Gen. St. Kan. 1901, § 4522, where a petition sets up a cause of action in ejectment and another for rents and profits, a motion to separately state and number the two causes of action should be sustained. New v. Smith, 84 P. 1030, 73 Kan. 174.

A petition against the A. and the F., and other railroad companies, alleged that plaintiff was a stockholder in the F. company, and, after setting out a history of certain transactions, prayed that the A. company be compelled to account for the proceeds of certain bonds which it is alleged were wrongfully surrendered to it by the F. company; that it recover from the A. company the rents and profits of the F. company from the time it was built; that certain shares of stock of the F. company which were issued to the A. company be canceled; and that a consolidation of the A., the F., and other companies be declared void. Held, that plaintiff should have been required to separately state and number his several causes of action. Atchison, T. & S. F. R. Co. v. Board of Com'rs of Sumner County, 33 P. 312, 51 Kan. 617.

Where a petition alleges as ground for damages the premature bringing of a former action by defendant against plaintiff, and its dismissal, and that such action has been determined by the court as prematurely brought, and judgment therein rendered against plaintiff, alleging in another paragraph that defendant sued to enjoin plaintiff from doing certain acts, and that such injunction action was dismissed and judgment rendered for plaintiff for costs, and a third paragraph alleges refusal of defendant to do certain things which he had agreed to do under a written contract, it states three causes of action, so that a motion to require these three causes to be separately stated and numbered was proper. Burdick v. Carbondale Inv. Co., 80 P. 40, 71 Kan. 121.

[87] Southern Surety Co. v. Waits, 45 Okl. 513, 146 P. 431.

Motion to separately state and number, which fails to point out causes of

MOTION TO SEPARATELY STATE AND NUMBER

(Caption.)

Comes now the defendant, A. B., and moves the court to require the plaintiff to separately state and number the various causes of action alleged in plaintiff's petition filed herein.

———, Attorneys for Defendant.

§ 700. —— Waiver—Dismissal

The right to move to have different causes of action separately stated and numbered is waived by demurring to either the whole or a part of the petition.[88]

When a petition embraces two separate and distinct causes of action in one count, and, on motion, plaintiff is required by the court to separately state and number them, and he refuses to do so, it is not error for the court to dismiss the action without prejudice to a future one.[89]

§ 701. Motion to require election—Form

Plaintiff cannot ordinarily be required to elect on which count he will proceed,[90] unless the causes of action are inconsistent with

action or call court's attention to paragraphs which should be separately stated and numbered, is too general. Henry v. Gulf Coast Drilling Co., 56 Okl. 604, 156 P. 321; Western Union Tel. Co. v. Simpson, 62 P. 901, 10 Kan. App. 473.

Where it is not obvious that the petition states more than one cause of action, and the motion to require plaintiff to separately state and number the several causes of action is general and fails to specify wherein the petition states more than one cause of action, it is not error to overrule the motion. Cockrell v. Schmitt, 94 P. 521, 20 Okl. 207, 129 Am. St. Rep. 737.

[88] First Nat. Bank of Tishomingo v. Ingle, 132 P. 895, 37 Okl. 276.

Where petition states both statutory and common-law cause of action, growing out of same transaction, in one count, there is a defect within Rev. Laws 1910, § 4738, that may be remedied on motion, but cannot be reached by demurrer. Shelby-Downard Asphalt Co. v. Enyart (Okl.) 170 P. 708.

[89] Eisenhouer v. Stein, 15 P. 167, 37 Kan. 281.

[90] Woodman v. Davis, 4 P. 262, 32 Kan. 344.

Where petition alleged deposit with defendant bank of a note for collection, which note was secured by chattel mortgage, and the bank allowed the mortgage to expire and also failed to apply certain deposits made in the bank by the maker to payment of the note but applied such deposits to its own use, it was error to require plaintiff to elect on which theory he would rely for recovery. Bourland v. Madill State Bank, 124 P. 314, 32 Okl. 761.

Where petition alleged execution of note, its return to maker, and his receipt therefor conditioned to pay in case of any mistake as to his claim of

each other.[91] For example, where the petition alleged in one paragraph the existence of an agency, and in another that the acts of the party assuming to act as agent had been ratified, the court properly refused to require plaintiff to elect upon which he would stand.[92]

In a suit on account for services rendered, where there is uncertainty as to the grounds of recovery, there may be properly joined in the petition a count on an express contract, a count on quantum meruit, and the granting of a motion to require plaintiff to elect is addressed to the discretion of the trial court.[93]

Where a petition states one cause of action and the evidence tends to establish that cause of action, it is not error to refuse to require the plaintiff to make any election between different phases of the evidence.[94] But where a party pleads facts constituting two causes of action, one for rescission of contract and one for damages for breach of warranty, it is proper to require an election between the causes.[95]

Where separate causes of action are improperly joined in a pe-

payment, an arbitration finding it unpaid, maker's failure to acquiesce in award or to pay or return note, it was not error to deny motion to compel plaintiff to elect as to cause of action, submitted by court as an action upon an alleged indebtedness. Washington Nat. Bank v. Myers, 104 Kan. 526, 180 P. 268.

Where a petition states facts entitling plaintiff either to a decree of specific performance of a contract to convey land or judgment for damages and prays for such judgment, he may not be required to elect his remedy before trial. Huey v. Starr, 101 P. 1075, 79 Kan. 781, rehearing denied 104 P. 1135, 79 Kan. 781.

[91] Action for specific performance of husband and wife's oral contract to raise plaintiff as their child, and that on their death she should inherit as if they died intestate and to recover on implied contract for reasonable value of plaintiff's services, held inconsistent, and court did not err in compelling plaintiff to elect. Pantel v. Bower, 104 Kan. 18, 178 P. 241.

A count of a petition which claims the price of property on the theory that plaintiff has parted with title to it by sale, and that defendant owns it and is entitled to its possession, is inconsistent with another count asking damages as in trover for its conversion on the theory that the plaintiff owned it, and it is not error to require an election between such counts. J. B. Ehrsam & Sons Mfg. Co. v. Jackman, 85 P. 559, 73 Kan. 435, rehearing denied 91 P. 486, 73 Kan. 435.

[92] Amazon Fire Ins. Co. v. Bond (Okl.) 165 P. 414.

[93] Mellon v. Fulton, 98 P. 911, 22 Okl. 636, 19 L. R. A. (N. S.) 960.

[94] Harris v. Morrison, 163 P. 1062, 100 Kan. 157.

[95] Muenzenmayer v. Hay, 159 P. 1, 98 Kan. 538.

tition and no demurrer is filed, the defect cannot be taken advantage of by motion to require plaintiff to elect.[96]

As inconsistent defenses may be included in one answer, election between them cannot be required.[97]

Misjoinder of causes of action is not raised by a motion to require the pleader to elect.[98]

MOTION TO REQUIRE ELECTION

(Caption.)

Comes now the above named defendant, and moves the court to require the plaintiff to elect on which cause of action stated in his petition he will proceed, for the reason that in the first cause of action therein stated plaintiff repudiates and asks to rescind the contract therein alleged, for the reason that the same is void on the ground of fraud, and in the second cause of action alleged plaintiff seeks to affirm said alleged contract and recover damages for an alleged breach thereof, and that said causes of action are inconsistent. X. Y., Attorney for Defendant.

§ 702. —— Time of making

An objection to inconsistent counts in a petition and motion to require plaintiff to elect should be made before answer, and the overruling of such objection made at the commencement of trial is within the discretion of the trial court.[99]

[96] Oates v. Freeman, 57 Okl. 449, 157 P. 74.

[97] Emerson-Brantingham Implement Co. v. Ware (Okl.) 174 P. 1066.

Even if defenses are inconsistent, unless expressly prohibited by statute, they may be united in one answer, and the pleader cannot be compelled to elect between them. Covington v. Fisher, 97 P. 615, 22 Okl. 207.

Where answer sets forth in separate paragraphs a different state of facts, each of which constitutes a defense or counterclaim, defendant cannot be required to elect on which paragraph he will proceed to trial. Oklahoma Hay & Grain Co. v. T. D. Randall & Co. (Okl.) 168 P. 1012; Rev. Laws 1910, § 4745, subd. 3.

[98] West v. Madansky (Okl.) 194 P. 439.

[99] Day v. Kansas City Pipe Line Co., 125 P. 43, 87 Kan. 617.

ARTICLE XI

DEMURRER

Sections

703. Grounds—Form.
704. Misjoinder of parties.
705. Office of demurrer.
706. Requisites and construction.
707. Time to demur—After motions.
708. Admissions for purpose of demurrer.
709. General demurrer.
710. Limitations.
711. Objection to introduction of any evidence as alternative.
712. Demurrer and answer.
713. Where single count.
714. Joint demurrer.
715. Demurrer to answer.
716. To amended answer.
717. To set-off or counterclaim.
718. Demurrer to reply.
719. Demurrer relating back.
720. Construction of pleading demurred to.
721. Ruling, order, and judgment.

§ 703. Grounds—Forms

"The defendant may demur to the petition only when it appears on its face, either:

"First. That the court has no jurisdiction of the person of the defendant, or the subject of the action.

"Second. That the plaintiff has no legal capacity to sue.

"Third. That there is another action pending between the same parties for the same cause.

"Fourth. That there is a defect of parties, plaintiff or defendant.[1]

[1] "Defect of parties," within the statute making it a ground of demurrer, means too few and not too many parties, and is not synonymous with "misjoinder of parties," which means an excess of parties. Niblo v. Drainage Dist. No. 3, 58 Okl. 639, 160 P. 468.

A petition alleging a cause of action against a railway company and certain persons named as receivers of its property is not demurrable on the ground that it shows a defect of parties, nor on the ground that it fails to state a cause of action against either one because the other is charged also with the same liability. Union Pac. Ry. Co. v. Smith, 52 P. 102, 59 Kan. 80.

A demurrer to a petition for a defect of parties defendant should point out the parties improperly omitted, and where this is not done the overruling of

"Fifth. That several causes of action are improperly joined.[2]

"Sixth. That the petition does not state facts sufficient to constitute a cause of action." [3]

DEMURRER TO PETITION, CONTAINING ALL STATUTORY GROUNDS

(Caption.)

Comes now the said defendant and demurs to the petition of plaintiff filed herein, and for grounds of demurrer alleges:

1. That it appears upon the face of said petition that the court has no jurisdiction of the person of this defendant.

2. That the court has not jurisdiction of the subject of this action (pointing out why).

the demurrer cannot be regarded as erroneous. Federal Betterment Co. v. Blaes, 88 P. 555, 75 Kan. 69.

Where a suit is brought against one person, and the petition discloses on its face that the debt sued on is the debt of a co-partnership, a demurrer for defect of parties defendant is the proper practice, and should be sustained. Cox v. Gille Hardware & Iron Co., 58 P. 645, 8 Okl. 483.

A general demurrer does not raise the question of defect of parties. Davis v. Caruthers, 97 P. 581, 22 Okl. 323. A defect of parties is waived where there is no special demurrer on that ground and the question is not otherwise raised. Id.

The question of defect of parties plaintiff must be raised by demurrer if the defect appears on the face of the petition, otherwise by answer, and if no objection be taken any other way, the same is waived. Culbertson v. Mann, 30 Okl. 249, 120 P. 918; Coulson v. Wing, 22 P. 570, 42 Kan. 507, 16 Am. St. Rep. 503; Union Pac. Ry. Co. v. Kindred, 23 P. 112, 43 Kan. 134; Ryan v. Phillips, 44 P. 909, 3 Kan. App. 704; Harrah State Bank v. School Dist. No. 70, Oklahoma County, 47 Okl. 593, 149 P. 1190; Burton v. Cochran, 47 P. 569, 5 Kan. App. 508.

Objections to a counterclaim which asks affirmative relief on the ground of defect of parties are waived by reply without demurrer. Wyman v. Herard, 50 P. 1009, 9 Okl. 35.

[2] West v. Madansky, 80 Okl. 161, 194 P. 439; Lyons v. Berlau, 73 P. 52, 67 Kan. 426.

Under the rule of procedure in the territory of Oklahoma prior to its admission as a state, which is the rule of procedure now in force in the state, misjoinder of causes of action should be raised by demurrer. Choctaw, O. & G. R. Co. v. Burgess, 97 P. 271, 21 Okl. 653.

Where a petition contains two or more causes of action which cannot be properly united in the same action, the fact that they are in one statement, instead of being set forth in separate counts, will not deprive defendant of his right to demur. Benson v. Battey, 78 P. 844, 70 Kan. 288, 3 Ann. Cas. 283.

[3] Rev. Laws 1910, § 4740.

A petition warranting relief either at law or in equity is good on a general demurrer. Schanbacher v. Payne, 79 Okl. 101, 191 P. 173.

3. That the plaintiff has no legal capacity to sue (pointing out defect relied upon).

4. That there is another action pending between the same parties for the same cause (specifying same).

5. That there is a defect of parties plaintiff (or defendant) in the omission of (designating party) who is a necessary party plaintiff (or defendant).

6. That several causes of action are improperly joined, in this, to wit: (Pointing out how.)

7. That the petition does not state facts sufficient to constitute a cause of action in favor of plaintiff and against this defendant

8. That said petition shows upon its face that the alleged cause of action is barred by the statute of limitations of the state of Oklahoma.

A. B., Attorney for Defendant.

§ 704. —— Misjoinder of parties

A misconduct of parties plaintiff is not a cause for demurrer.[4]

§ 705. Office of demurrer

The office of a demurrer is primarily to raise an issue of law on facts raised in the pleading attacked,[5] and to challenge the sufficiency of a pleading on its face.[6]

[4] First Nat. Bank of Russell v. Knoll, 52 P. 619, 7 Kan. App. 352; Stiles v. City of Guthrie, 41 P. 383, 3 Okl. 26; Martin v. Clay, 56 P. 715, 8 Okl. 46; Powell v. Dayton, S. & G. R. R. Co., 11 P. 222, 13 Or. 446; Pierson v. Fuhrmann, 27 P. 1015, 1 Colo. App. 187; Stiles v. City of Guthrie, 41 P. 383, 3 Okl. 26; Marth v. City of Kingfisher, 98 P. 436, 22 Okl. 602, 18 L. R. A. (N. S.) 1238; City of Pawhuska v. Rush, 119 P. 239, 29 Okl. 759; Marshall v. City of Osborne, 104 Kan. 377, 179 P. 303; Bourland v. Madill State Bank, 124 P. 314, 32 Okl. 761; Tucker v. Hudson, 38 Okl. 790, 134 P. 21; Dieterle v. Harris (Okl.) 169 P. 873.

Neither misjoinder of parties nor excess of parties can be taken advantage of by demurrer, but can only be reached by motion filed before joining issues on the merits. State Exch. Bank of Elk City v. National Bank of Commerce

[5] Bristow v. Carrigar, 132 P. 1108, 37 Okl. 736.

Where it appears on the face of petition that contract sued on is within statute of frauds the defect may be taken advantage of by demurrer. Crabtree v. Eufaula Cotton Seed Oil Co., 122 P. 664, 32 Okl. 465.

An objection that a petition fails to state a cause of action should be presented by demurrer. Lankford v. Schroeder. 47 Okl. 279, 147 P. 1049, L. R. A. 1915F, 623.

[6] Ball v. White, 50 Okl. 429, 150 P. 901; McConnell v. Davis, 46 Okl. 201, 148 P. 687.

A demurrer will not lie where the alleged defects do not appear on the face of the pleading,[7] or to rid a single cause of action or defense of irrelevant, redundant, or improper matter,[8] or because of mere generality in the allegation of essential facts or mere conclusions of fact,[9] or because the pleading is indefinite and uncertain and properly subject to a motion to make more definite and certain,[10] or because of redundancies which may properly be reached by motion to strike out.[11] Nor will a demurrer raise the question of inconsistency or departure in the pleadings,[12] or reach a failure

(Okl.) 174 P. 796, 2 A. L. R. 211; Same v. Traders' Nat. Bank of Kansas City, Mo. (Okl.) 174 P. 799; Choctaw, O. & G. R. Co. v. Burgess, 97 P. 271, 21 Okl. 653.

[7] Continental Ins. Co. v. Pratt, 55 P. 671, 8 Kan. App. 424; Sweet v. Crane, 39 Okl. 248, 134 P. 1112.

Where the petition, in an action on a voluntary bond of a district clerk, charged the due execution of the bond, the defense that it was given without consideration, not appearing therein, could not be raised by demurrer. Ahsmuhs v. Bowyer, 39 Okl. 376, 135 P. 413, 50 L. R. A. (N. S.) 1060.

Where a petition in replevin, on its face, states a cause of action, and the defendant relies upon the fact that a valid service of summons was not had until more than two years after the cause of action accrued, such a defense cannot be raised by demurrer. Harris v. Bell, 59 P. 1095, 9 Kan. App. 706.

A demurrer to a bill of particulars on the ground that there is another action pending between the same parties for the same cause of action should be overruled where such fact does not appear on the face of the pleadings. Biard v. Laumann, 116 P. 780, 29 Okl. 138.

[8] Sparks v. Smeltzer, 93 P. 338, 77 Kan. 44.

[9] Gano v. Cunningham, 128 P. 372, 88 Kan. 300.

Conclusions of fact held not to render a pleading bad as against a demurrer, in the absence of a motion to make definite and certain. Roberts v. Pendleton, 142 P. 289, 92 Kan. 847.

A demurrer to a petition on the ground that the material facts are set forth in general terms will not lie. Board of Com'rs of Neosho County v. Spearman, 130 P. 677, 89 Kan. 106.

[10] City of Guthrie v. Shaffer, 54 P. 698, 7 Okl. 459; Wey v. City Bank of Hobart, 116 P. 943, 29 Okl. 313.

Indefiniteness and informality of pleading cannot be alleged by demurrer or objection to evidence. Burnette v. Elliott, 84 P. 374, 72 Kan. 624.

[11] Bank of Le Roy v. Harding, 41 P. 680. 1 Kan. App. 389.

[12] Walters v. Chance, 85 P. 779, 73 Kan. 680; Fetzer & Co. v. Williams, 103 P. 77, 80 Kan. 554.

Inconsistent averments in a petition, which might have been stricken out on motion, furnish no ground of demurrer, if by rejecting them, a cause of action still remains. Nicholson v. Nicholson, 109 P. 1086, 83 Kan. 223.

The fact that more than one ground of recovery may have been pleaded in the petition, or that the grounds set up for recovery may not be consistent with each other, affords no reason for sustaining a demurrer which challenges

to attach to the petition a copy of the written instrument upon which the cause of action is based.[13]

A petition is not demurrable because it commingles several causes of action erroneously paragraphed or subdivided; the remedy in such cases being by motion to separately state and number.[14]

Demurrer is not the proper method by which to object to a suit against a defendant by initials instead of by his Christian name.[15]

The question of the ownership of the notes sued on cannot be raised by demurrer.[16]

§ 706. Requisites and construction

"The demurrer shall specify distinctly the grounds of objection to the petition. Unless it do so, it shall be regarded as objecting only that the petition does not state facts sufficient to constitute a cause of action." [17]

only the sufficiency of the facts alleged. Bichel v. Oliver, 95 P. 396, 77 Kan. 696.

An objection to a pleading on the ground of departure cannot be raised by demurrer. Merchants' & Planters' Ins. Co. v. Marsh, 125 P. 1100, 34 Okl. 453, 42 L. R. A. (N. S.) 996; Landon v. Morehead, 126 P. 1027, 34 Okl. 701; Purcell v. Corder, 124 P. 457, 33 Okl. 68.

[13] Incorporated Town of Sallisaw v. Chappelle (Okl.) 171 P. 22; Rev. Laws 1910, § 4769.

That a copy of the account sued on was not attached to the petition did not render the petition demurrable under Rev. Laws 1910, § 4769. Rogers' Milling Co. v. Goff, Gamble & Wright Co., 46 Okl. 339, 148 P. 1029.

Petition held not demurrable where it stated a cause of action on account, though exhibits attached to it suggested a doubt as to whether defendant acted in a representative capacity or as an individual. Calman v. Kreipke, 139 P. 698, 40 Okl. 516.

A petition in an action on account for goods sold by a corporation held not demurrable, though it did not describe the account otherwise than as that of defendant, and was signed only by the vice president, without any seal attached. Davison v. Calmback, 148 P. 625, 95 Kan. 560.

[14] First Nat. Bank of Tishomingo v. Ingle, 132 P. 895, 37 Okl. 276; City of Ellsworth v. Rossiter, 26 P. 674, 46 Kan. 237.

A demurrer will not lie against a petition which is defective only in not separately stating and numbering the several causes of the action supposed to be stated therein. Walker v. Sims, 64 P. 81, 9 Kan. App. 890.

Where petition states both statutory and common-law cause of action, grow-

[15] McColgan v. Territory, 49 P. 1018, 5 Okl. 567.

[16] Waldock v. Winkler, 51 Okl. 485, 152 P. 99.

[17] Rev. Laws 1910, § 4741.

A demurrer to a pleading must specify the grounds of the objection. Tootle v. Berkley, 45 P. 77, 57 Kan. 111.

The question of a defect of parties cannot be raised under a general demurrer alleging simply a want of facts sufficient to state a cause of action.[18]

Where the petition is a single cause of action or count, though the pleader paragraphs the same and numbers each paragraph, it is error to sustain a demurrer on the ground "that none of the counts state a cause of action." [19]

Where a demurrer to a petition consisting of one count is sustained, and the same is refiled unchanged, except for a second cause of action plaintiff attaches thereto a second count, a demurrer subsequently filed only applies to the second count.[20]

§ 707. Time to demur—After motions

A demurrer to a pleading is a waiver of all defects that should properly be raised by motion.[21]

§ 708. Admissions for purpose of demurrer

A demurrer to a pleading admits the truth of the allegations thereof,[22] which are well pleaded,[23] but does not determine the truth of the pleader's inference based on facts pleaded unless the facts are sufficient to authorize such inference,[24] nor does it admit the truth

ing out of same transaction, in one count, there is a defect within Rev. Laws 1910, § 4738, that may be remedied on motion, but cannot be reached by demurrer. Shelby-Downard Asphalt Co. v. Enyart (Okl.) 170 P. 708.

[18] A. Helm & Son v. Briley, 87 P. 595, 17 Okl. 314.

[19] Burton v. Doyle, 48 Okl. 755, 150 P. 711.

[20] Schoner v. Allen, 105 P. 191, 25 Okl. 22.

[21] Union State Bank v. Woodside (Okl.) 178 P. 109.

[22] C. E. Sharp Lumber Co. v. Kansas Ice Co., 142 P. 1016, 42 Okl. 689; Tancred v. Brewer, 75 Okl. 17, 181 P. 490; Gregg v. Oklahoma State Bank (Okl.) 179 P. 613.

A demurrer to an answer admits the allegation of ownership therein, making proof unnecessary, though the exhibits thereto show that, under a rule of evidence, defendant is without proof thereof. State v. Freeman, 62 P. 717, 10 Kan. App. 578.

In an action for death of a child from drowning in a pond in a city park, a demurrer to the petition admitted its allegations generally, and especially as to the physical conditions of the pond. Harper v. City of Topeka, 139 P. 1018, 92 Kan. 11, 51 L. R. A. (N. S.) 1032.

[23] A demurrer only admits facts which are well pleaded. Adams v. Couch, 26 P. 1009, 1 Okl. 17.

A demurrer admits every material fact properly stated in plaintiff's petition. Scrivner v. McClelland, 75 Okl. 239, 182 P. 503.

[24] Kee v. Armstrong, Byrd & Co., 75 Okl. 84, 182 P. 494, 5 A. L. R. 1349.

Allegations of a petition placing a practical interpretation on the bond sued

of the allegations of the pleading attacked, except for the purpose of determining their legal effect,[25] and to test the demurrer.[26]

On a demurrer to an answer which is carried back to the petition, the plaintiff will not be deemed to have admitted allegations in the answer inconsistent with and contradictory to those included in the petition.[27]

The pleading demurred to must be liberally construed.[28]

§ 709. General demurrer

A general demurrer to a petition raises only the question of its sufficiency in stating a cause of action.[29] It should be sustained where the petition neither states a cause of action in equity or at law,[30] or omits any fact or facts essential to be established by proof to sustain the action,[31] or shows that the remedy sought is barred

on were not to be taken as true on demurrer when inconsistent with the language of the bond. Rettiger v. Dannelly, 136 P. 942, 91 Kan. 61.

Though a demurrer admits the facts of a petition, yet, where an agreement is in parol, the defendant is entitled to the benefit of the statute of frauds, unless the part performance pleaded is sufficient to avoid its operation. Purcell v. Corder, 124 P. 457, 33 Okl. 68. The effect of a demurrer to a petition pleading an oral agreement is the same as an answer admitting the agreement, but claiming the benefit of the statute of frauds. Id. If the petition alleges such a part performance as will take the agreement out of the statute of frauds, the demurrer is such an admission of part performance as will preclude defendant from the benefit of the statute. Id.

25 Jacobs v. Vaill, 72 P. 530, 67 Kan. 107.

26 Buell v. U-Par-har-ha, 60 Okl. 79, 159 P. 507.

27 Marney v. Joseph, 145 P. 822, 94 Kan. 18, Ann. Cas. 1917B, 225.

28 On demurrer to a petition as defective for not stating a cause of action, the petition must be liberally construed, and all its allegations for the purpose of the demurrer taken as true. Oklahoma Sash & Door Co. v. American Bonding Co. (Okl.) 170 P. 511.

On demurrer to an answer as not stating a defense, the pleading must be liberally construed, and all its allegations, for the purposes of the demurrer, taken as true; and the demurrer will be sustained only where the answer presents defects so substantial as to authorize the court to say that, taking all the facts to be admitted, they constitute no defense to the action stated in the petition. Smith-Wogan Hardware & Implement Co. v. Jos. W. Moon Buggy Co., 108 P. 1103, 26 Okl. 161.

29 Westervelt v. Jones, 47 P. 322, 5 Kan. App. 35.

30 Kimmell v. Powers, 91 P. 687, 19 Okl. 339.

While an action improperly brought for specific performance may be retained to render damages for breach of contract, yet if the petition, after repeated amendments, neither states a cause of action for specific performance, nor for breach of contract a general demurrer should be sustained. Schilling v. Moore, 125 P. 487, 34 Okl. 155.

31 Garten v. Trobridge, 104 P. 1067, 80 Kan. 720.

by reason of plaintiff's laches,[32] but should be overruled where the petition states facts constituting a cause of action and is sufficiently definite to put defendant on notice of what he is charged with,[33] though the relief prayed for is not that to which the facts entitle the plaintiff,[34] and though the petition seeks to recover more relief than that to which plaintiff is entitled.[35]

Where no motion to make more definite has been presented, the demurrer should be overruled if the facts stated, when all are taken as true, constitute a cause of action, whether well pleaded or not.[36]

[32] City of Leavenworth v. Douglass, 53 P. 123, 59 Kan. 416.

[33] Incorporated Town of Stigler v. Wiley, 128 P. 118, 36 Okl. 291.

It is not error to overrule demurrer where allegations of petition construed most favorably to pleader set up cause of action. Henry v. Gulf Coast Drilling Co., 56 Okl. 604, 156 P. 321.

Though petition in action to recover on contractor's surety bond, which plainly alleged that a stated balance was due, contained obvious clerical error as to amount already paid, whereby it might be asserted that no balance was due, it is not subject to demurrer. Sheahan v. United States Fidelity & Guaranty Co., 163 P. 172, 99 Kan. 704.

Where a pleading states any facts upon which the pleader is entitled to any relief under the law, a general demurrer should not be sustained. Bishop-Babcock-Becker Co. v. Estes Drug Co., 63 Okl. 117, 163 P. 276; C. E. Sharp Lumber Co. v. Kansas Ice Co., 142 P. 1016, 42 Okl. 689.

Where pleading contains more than one paragraph alleging more than one cause of action or defense and states one cause of action or defense, it is error to sustain general demurrer to it as entirety. Zebold v. Hurst (Okl.) 166 P. 99, L. R. A. 1917F, 579.

Where a pleading consists of more than one count, each count must, as against a general demurrer be considered as if constituting the entire pleading. Riverside Tp. v. Bailey, 82 Kan. 429, 108 P. 796.

[34] Anderson v. Muhr, 128 P. 296, 36 Okl. 184.

Where the relief prayed for is for a money judgment, and plaintiff does not state the amount for which she asked judgment, as required by Wilson's Rev. & Ann. St. 1903, § 4291, such failure does not alone render the petition so insufficient as to render it subject to demurrer on the ground that it does not state facts sufficient to constitute a cause of action. Oklahoma Gas & Electric Co. v. Lukert, 84 P. 1076, 16 Okl. 397.

A petition, alleging that plaintiff purchased land from defendants relying on their willfully false statements that they had an absolute title when in fact they had less than a full title, held good on demurrer, though rescission was not in terms asked for, and no formal offer to reconvey was made, and the facts were not pleaded by which damages recoverable could be accurately measured. Klingman v. Gilbert, 135 P. 682, 90 Kan. 545.

[35] Updegraff v. Lucas, 93 P. 630, 76 Kan. 456, 13 Ann. Cas. 860, rehearing denied 94 P. 121, 76 Kan. 456, 13 Ann. Cas. 860; Walker v. Fleming, 14 P. 470, 37 Kan. 171.

[36] Bowersox v. J. W. Hall & Co., 84 P. 557, 73 Kan. 99.

Where the language of a petition is sufficiently explicit to raise an issue of

A general demurrer to a petition, which attempts to state several causes of action, should be overruled if any of the statements of causes of action are good,[37] though such facts may not entitle plaintiff to the entire relief prayed for.[38]

Where a petition states a valid cause of action as to a part of the relief demanded, a judgment sustaining a demurrer generally is erroneous.[39]

A joint general demurrer should be overruled where the petition states a cause of action against any party joining in the demurrer.[40]

Where a petition of two plaintiffs states a cause of action as to but one of them, it is proper practice to overrule a general demurrer thereto as to him, and sustain it as to the other plaintiff.[41]

Where a pleader alleges two different rights of recovery and the question is whether either of said remedies is proper, a general demurrer should be overruled if facts are alleged sufficient to constitute a cause of action for either remedy.[42]

When the separate paragraphs of a petition sufficiently state a cause of action for debt and mortgage foreclosure, a general demurrer to each of such paragraphs should be overruled, though plaintiff also asks for an attorney's fee, which is not recoverable.[43]

A petition in action for money had and received is not subject to general demurrer for failure to allege what specific use was made of money.[44]

fact on which the pleader would be entitled to recover, it is error to sustain a general demurrer. Berry v. Geiser Mfg. Co., 85 P. 699, 15 Okl. 364.

[37] Emmerson v. Botkin, 109 P. 531, 26 Okl. 218, 29 L. R. A. (N. S.) 786, 138 Am. St. Rep. 953; Hanenkratt v. Hamil, 61 P. 1050, 10 Okl. 219; Blackwell Oil & Gas Co. v. Whitesides (Okl.) 174 P. 573; Chupco v. Chapman (Okl.) 160 P. 88; Coody v. Coody, 136 P. 754, 39 Okl. 719, L. R. A. 1915E, 465; Cockrell v. Schmitt, 94 P. 521, 20 Okl. 207, 129 Am. St. Rep. 737; Ardmore State Bank v. Mason, 30 Okl. 568, 120 P. 1080, 39 L. R. A. (N. S.) 292.

[38] Watkins v. Yell (Okl.) 176 P. 390.

[39] St. Louis & S. F. R. Co. v. Commissioners of Labette County, 63 Kan. 889, 66 P. 1045.

Where petition states a good cause of action for foreclosure of a mechanic's lien, and seeks to recover $40 attorney's fees, the allegation as to the attor-

[40] Rogers' Milling Co. v. Goff, Gamble & Wright Co., 46 Okl. 339, 148 P. 1029.

[41] Bissey v. Marion (Kan.) 178 P. 991.

[42] Gourley v. Lookabaugh, 48 Okl. 65, 149 P. 1169.

[43] Hailey v. Bowman, 137 P. 722, 41 Okl. 294.

[44] Cleveland Nat. Bank v. Board of Education of City of Cleveland (Okl.) 179 P. 464.

A misjoinder of causes of action can only be reached by special demurrer setting forth distinctly the grounds of objection, and cannot be met by general demurrer.[45]

An oral demurrer should be considered as a general demurrer only, and be overruled, where the pleading attacked states a cause of action entitling the pleader to any relief.[46]

§ 710. —— Limitations

Where petition on its face shows that cause of action is barred by limitations, a general demurrer thereto is properly sustained, unless facts as pleaded in the petition show that the statute has been tolled.[47]

ney's fees, none being allowed, will not render the petition so defective that the matter may be reached by general demurrer to the whole petition. Savage v. Dinkler, 72 P. 366, 12 Okl. 463.

[45] State Exch. Bank of Elk City v. National Bank of Commerce (Okl.) 174 P. 796, 2 A. L. R. 211; Same v. Traders' Nat. Bank of Kansas City, Mo. (Okl.) 174 P. 799.

A general demurrer does not go to a misjoinder of causes of action, under Rev. Laws 1910, § 4740, subsec. 5, and in order to attack a misjoinder of causes of action a demurrer for such misjoinder must be interposed. Hart-Parr Co. v. Thomas (Okl.) 171 P. 867.

[46] United States Fidelity & Guaranty Co. v. Fidelity Trust Co., 49 Okl. 398, 153 P. 195.

[47] Delzell v. Couch (Okl.) 173 P. 361; Missouri, K. & T. Ry. Co. v. Wilcox, 121 P. 656, 32 Okl. 51; Territory v. Woolsey, 130 P. 934, 35 Okl. 545; Ostran v. Bond (Okl.) 172 P. 447; Webb v. Logan, 48 Okl. 354, 150 P. 116; Fox v. Ziehme, 30 Okl. 673, 120 P. 285; Froage v. Webb (Okl.) 165 P. 150. Where petition in action for breach of oral contract showed that cause of action accrued more than three years before commencement of action, and did not allege any written acknowledgment of existing liability within limitations, overruling of demurrer thereto was error. Id.

The defense of the statute of limitations may be availed of by general demurrer, or by an objection to testimony under the petition. Martin v. Gassert, 139 P. 1141, 40 Okl. 608. A petition, showing on its face that a fraud on which the cause of action was founded was consummated more than two years before action brought is demurrable, where it does not show that plaintiff did not discover the fraud until within the two years. Id.

Only an explicit allegation, showing that limitations have run, renders a petition demurrable. Wray v. Howard, 79 Okl. 223, 192 P. 584.

Kansas cases.—The defense of limitations cannot be raised by demurrer, unless it distinctly appears on the face of the petition that the action is necessarily barred. Walker v. Fleming, 14 P. 470, 37 Kan. 171.

The objection that a cause of action is barred by limitations cannot be taken by demurrer, unless the petition shows on its face that the cause of action is

But where the petition on its face does not show that the cause of action is barred by limitations, a demurrer thereto on that ground should be overruled.[48]

§ 711. —— Objection to introduction of any evidence as alternative

Defendant may demur to a petition for not stating facts sufficient to constitute a cause for action, or may question its sufficiency by objection to the introduction of evidence.[49]

§ 712. Demurrer and answer

"The defendant may demur to one or more of the several causes of action stated in the petition, and answer to the residue." [50]

§ 713. —— Where single count

Where a demurrer and an answer are filed at the same time, and the petition contains but one count, the answer will be held to have

so barred. Garfield Tp., Finney County, v. Dodsworth, 9 Kan. App. 752, 58 P. 565.

A demurrer should be sustained where the complaint shows on its face that the action is barred. Morgan v. Van Wyck, 5 Kan. App. 520, 48 P. 206; City of Phillipsburg v. Kincaid, 50 P. 1093, 6 Kan. App. 377; Hunt v. Jetmore, 61 P. 325, 9 Kan. App. 333.

A petition held demurrable where it appeared that the action was barred under the statute of Kansas and no other statute was pleaded. Perry v. Robertson, 150 P. 223, 93 Kan. 703, 96 Kan. 96. A petition on a written contract maturing more than five years before action is demurrable, unless it shows some fact interrupting the running of limitations. Id.

Limitation is a matter of defense, and only explicit allegations showing directly that limitations have run renders a petition demurrable; the question otherwise being raised by special plea. Brunbaugh v. Wilson, 82 Kan. 53, 107 P. 792.

Where the exhibits attached to a petition show upon their face that the cause of action set out therein is barred by the statute of limitations, and there are no allegations in the petition showing that the cause of action is not so barred, held, that a demurrer to such a petition should be sustained. School Dist. No. 1 v. Herr, 50 P. 101, 6 Kan. App. 861.

[48] Tucker v. Hudson, 38 Okl. 790, 134 P. 21; Lindsay v. Chicago, R. I. & P. Ry. Co., 56 Okl. 234, 155 P. 1173; United States Fidelity & Guaranty Co. v. Fidelity Trust Co., 49 Okl. 398, 153 P. 195.

[49] Brown v. Galena Mining & Smelting Co., 4 P. 1013, 32 Kan. 528.

In action for breach of contract, failure to allege performance on plaintiff's part presented only by objection to evidence and not by demurrer held immaterial. Capper v. Manufacturers' Paper Co., 121 P. 519, 86 Kan. 355.

[50] Rev. Laws 1910, § 4744.

superseded the demurrer, and the trial should proceed as though none had been filed.[51]

§ 714. Joint demurrer

A complaint which states a cause of action against one of several defendants is good against a joint demurrer.[52]

§ 715. Demurrer to answer

It is error to sustain a general demurrer to an answer which includes a general denial of the averments of the petition. The demurrer should be overruled as to that averment.[53] But the demurrer may be sustained where the answer contains averments inconsistent with the general denial.[54] A demurrer will not lie for surplusage or generalities.[55]

A general demurrer to an answer should be overruled, where the answer raises any issue necessary to be determined before judgment can be rendered on the petition,[56] and where the answer contains several paragraphs or defenses, one of which is good.[57]

[51] Ryndak v. Seawell, 76 P. 170, 13 Okl. 737.

Where a pleading styled an answer contained a demurrer, coupled with facts constituting a defense, and thereafter a general denial by way of a reply was filed, it was not error to disregard the demurrer, and require a trial on the merits. Title Guaranty & Surety Co. v. Slinker, 128 P. 696, 35 Okl. 128; Id., 128 P. 698, 35 Okl. 153.

[52] Stiles v. City of Guthrie, 3 Okl. 26, 41 P. 383.

[53] City of Guthrie v. T. W. Harvey Lumber Co., 50 P. 84, 5 Okl. 774.

An answer containing a general denial modified by admissions, but not admitting all facts necessary to entitle plaintiff to recover, is good as against demurrer. Rust v. Rutherford, 147 P. 805, 95 Kan. 152.

A general demurrer to an answer containing a general denial cannot be sustained. Marshall Mfg. Co. v. Dickerson, 55 Okl. 188, 155 P. 224. An answer containing a general denial and also a negative pregnant constituting admission of liability by defendant, though subject to motion for judgment on the pleadings, is not subject to a general demurrer. Id.

Where facts pleaded in a paragraph of an answer are admissible under a general denial pleaded, it is not error to sustain a demurrer to such paragraph. Hopkins v. Dipert, 69 P. 883, 11 Okl. 630.

[54] Adkins v. Arnold, 121 P. 186, 32 Okl. 167.

[55] A demurrer to an answer, in that the second clause of the first paragraph was not responsive to an allegation in the petition, that the third clause was evasive, and that another paragraph stated conclusions of law, and was not responsive to the allegations of the petition, was insufficient. Galbreath Gas Co. v. Lindsey, 129 P. 45, 35 Okl. 235.

[56] Simpson v. Collins, 62 P. 719, 10 Kan. App. 578.

Where an answer denies a material fact in the petition essential to plain-

[57] See note 57 on following page.

A pleading containing a general denial and also a general demurrer will be treated as an answer, and the demurrer will be considered waived.[58]

§ 716. —— To amended answer

Where an amended answer measurably complies in particulars required, with an order to make the original more definite and certain, it is error to sustain a motion to strike it from the files, though it may not state facts sufficient to constitute a defense; but a demurrer, so an amendment can be allowed, is proper.[59]

§ 717. —— To set-off or counterclaim

A set-off or counterclaim, to withstand a demurrer for want of facts, must, like any other complaint, state facts sufficient to constitute a cause of action.[60]

§ 718. Demurrer to reply

"If the reply to any defense set up by the answer be insufficient, the defendant may demur thereto, stating the grounds of such demurrer." [61]

To a reply containing a general denial and new matter, a demur-

tiffs' right of recovery, it is error to sustain a demurrer to such answer on the ground that it does not state a defense. Lee v. Mehew, 56 P. 1046, 8 Okl. 136.

Where an answer states facts constituting a defense in themselves, the sustaining of a general demurrer thereto is error. Gillum v. Anglin, 44 Okl. 684, 145 P. 1145.

[57] A demurrer to an answer containing several paragraphs must be overruled, if there is one good paragraph. Hurst v. Sawyer, 37 P. 817, 2 Okl. 470.

A general demurrer to an answer containing several defenses should be overruled, where any defense by itself, or the answer as a whole, states matters which defeat plaintiff's right to recover. Rust v. Rutherford, 147 P. 805, 95 Kan. 152; Mollohan v. King, 50 P. 881, 58 Kan. 816; Harrill v. Weer, 109 P. 539, 26 Okl. 313; Flint v. Dulany, 15 P. 208, 37 Kan. 332.

[58] State Exch. Bank v. National Bank of Commerce (Okl.) 174 P. 796, 2 A. L. R. 211; Same v. Traders' Nat. Bank (Okl.) 174 P. 799.

[59] McNinch v. Northwest Thresher Co., 100 P. 524, 23 Okl. 386, 138 Am. St. Rep. 803.

[60] In action on note, answer of defendant indorsers held, as against a demurrer, to sufficiently plead a set-off based upon alleged fraud practiced upon them by plaintiff holder and defendant maker of the note. Blair v. McQuary, 164 P. 262, 100 Kan. 203, modifying judgment on rehearing 162 P. 1173, 100 Kan. 203.

[61] Rev. Laws 1910, § 4754.

rer for want of facts is bad if not addressed especially to the new matter.[62]

§ 719. Demurrer relating back

A demurrer to an answer or reply searches the record.[63] A demurrer to a petition because not stating a cause of action can be sustained only where court can say that, taking all the facts to be admitted, they furnish no cause of action, and, if facts stated therein entitle plaintiff to any relief, a demurrer for want of facts should be overruled;[64] and where there is a general demurrer to defenses of an answer and the petition does not state facts sufficient to constitute a cause of action, a demurrer should be sustained to the petition.[65]

However, where a petition is defective for want of a material averment, but such averment is supplied by the answer and is not inconsistent with the averments of the petition, a demurrer filed to the answer and properly overruled will not be carried back and sustained as to the petition.[66]

§ 720. Construction of pleading demurred to

On demurrer a petition is liberally construed.[67] It must be construed with exhibits attached.[68]

[62] Ordway v. Cowles, 25 P. 862, 45 Kan. 447.

[63] In action on note, where answer alleged that it was given in connection with written contract in settlement of controversy between parties, and by the terms thereof it never became payable, held that demurrer to plaintiff's reply to answer should have been carried back to answer and sustained thereto, and judgment rendered for plaintiff. Rohrbaugh v. Cunningham, 101 Kan. 284, 166 P. 471.

[64] Oklahoma Sash & Door Co. v. American Bonding Co. (Okl.) 170 P. 511.

[65] Bartholomew v. Guthrie, 81 P. 491, 71 Kan. 705.

A demurrer to an answer brings up the sufficiency of the complaint. Johnson v. Wynne, 67 P. 549, 64 Kan. 138; Crow v. Hardridge (Okl.) 175 P. 115.

A demurrer to an answer may be carried back to a petition, though a previous demurrer to the petition has been overruled. Marney v. Joseph, 145 P. 822, 94 Kan. 18, Ann. Cas. 1917B, 225.

[66] Sill v. Sill, 1 P. 556, 31 Kan. 248.

[67] Jackson v. Moore, 79 Okl. 59, 191 P. 590.

[68] Southern Surety Co. v. Municipal Excavator Co., 61 Okl. 215, 160 P. 617, L. R. A. 1917B, 558; Pettis v. Johnston, 78 Okl. 277, 190 P. 681; Hughes v. Martin (Okl.) 196 P. 951.

Where the instrument sued on is attached by copy to the petition and made a part thereof, it should be made a part of the petition when constructing the allegations thereof as against a general demurrer. Whiteacre v. Nichols, 87 P. 865, 17 Okl. 387.

In replevin, the affidavit and bond for the ancillary order are not construed as parts of the pleadings, to determine whether a cause of action has been stated.[69]

On demurrer to improperly commingled paragraphs of a petition, the entire petition will be considered, and not merely the subdivisions attacked.[70]

In considering demurrers to separate causes of action, the court is not confined to allegations in a particular subdivision, but may supplement them with general allegations applicable alike to the different causes, though this could not be done if separate causes are separately stated and numbered, except where allegations are incorporated by reference.[71]

Facts not shown by the pleadings cannot be inquired into in determining sufficiency of a pleading on demurrer.[72]

§ 721. Ruling, order, and judgment

In sustaining a demurrer to a petition for misjoinder of causes of action, the court should so state, and afford plaintiff an opportunity to file several petitions.[73] But where a demurrer to a petition is sustained, and plaintiff fails to file an amended pleading as permitted by the order, a judgment dismissing his cause of action is proper.[74]

It is error for the court to render judgment by default on sustaining a demurrer to the answer, in the absence of defendant or his counsel, without giving defendant an opportunity to plead over or elect to stand on the demurrer.[75]

[69] Cudd v. Farmers' Exch. Bank of Lindsay, 76 Okl. 317, 185 P. 521.

[70] First Nat. Bank of Tishomingo v. Ingle, 132 P. 895, 37 Okl. 276.

[71] Chupco v. Chapman (Okl.) 160 P. 88.

Where a pleading consists of more than one count, neither the facts involved in the action nor the averments of another count, unless incorporated into the pleading demurred to, can be considered on a hearing on the demurrer. Riverside Tp. v. Bailey, 82 Kan. 429, 108 P. 796.

[72] Where, in an action by F. against D., charging that certain covenants contained in a deed by D. to F. were broken, neither the petition nor the exhibits connect D. with the title of the original grantor, W., on demurrer the court cannot properly determine the question of W.'s right to alienate. Faller v. Davis, 30 Okl. 56, 118 P. 382, Ann. Cas. 1913B, 1181.

[73] Whitley v. St. Louis, E. R. & W. Ry. Co., 116 P. 165, 29 Okl. 63; Rev. Laws 1910, § 4743.

[74] Cates v. Miles (Okl.) 169 P. 888; State v. Martin, 62 Okl. 295, 162 P. 1088.

[75] Thwing v. Doye, 44 P. 381, 2 Okl. 608.

Where an answer in an action on an official bond contains a general denial, and the plaintiff elects to stand on a demurrer, which is overruled, to two other paragraphs of the answer, which state a good defense, and nothing further is offered by the plaintiff, it is not error for the court to dismiss the cause.[76]

An order of the court overruling defendant's demurrer to the petition on the ground that it does not state facts sufficient to constitute a cause of action is not a final adjudication in plaintiff's favor, so as to prevent defendant, at the trial, from again attacking the sufficiency of the petition by an objection to the reception of any evidence thereunder.[77]

The court, by erroneously overruling a demurrer to the reply, is not precluded from correctly deciding a motion for judgment on the pleadings.[78]

An application for leave to answer after a demurrer has been adjudged frivolous rests largely within the trial court's reasonable discretion, and should be granted except in extreme cases.[79]

Where a demurrer to an answer is sustained, and defendant stands on his exception thereto, and judgment is rendered against him, and he takes additional time to prepare a case for appeal, and when, after the term has expired, he files a motion to set aside the judgment and be allowed to amend, the motion cannot be considered.[80]

It is error for a trial court to render a judgment sustaining a plea in abatement, without giving plaintiff an opportunity to plead thereto, where it cannot be said from the record that he elected to stand on his demurrer to the plea or refused to plead further.[81]

A judgment sustaining a demurrer to a petition from which no

[76] Board of Com'rs of Logan County v. Harvey, 52 P. 402, 6 Okl. 629.

[77] Goodrich v. Commissioners of Atchison County, 47 Kan. 355, 27 P. 1006, 18 L. R. A. 113.

[78] Sherburne v. Strawn, 34 P. 405, 52 Kan. 39.

[79] Nolen v. State, 48 Okl. 594, 150 P. 149; Jones v. Same, 48 Okl. 601, 150 P. 151.

A "frivolous pleading" is one so clearly untenable or the insufficiency of which is so manifest upon a bare inspection of the pleading that the court or judge is able to determine its character without argument or research. Nolen v. State, 48 Okl. 594, 150 P. 149; Jones v. Same, 48 Okl. 601, 150 P. 151.

[80] Davidson v. Hughes, 91 P. 913, 76 Kan. 247; Id., 91 P. 915, 77 Kan. 842.

[81] Nation v. Savely (Okl.) 176 P. 937.

appeal is taken does not control the judgment on hearing of a demurrer against an amended petition afterwards filed by leave of court.[82]

ARTICLE XII

ISSUES, PROOF, AND VARIANCE

DIVISION I.—ISSUES

Sections

722. Kinds.
723. Of law.
724. Of fact.
725. Where both issues arise.
726. Allegations deemed true.
727. Admissions.
728. Material allegation.

DIVISION II.—PROOF

729. Proof required under certain pleadings—Verified denial.
730. Proof admissible under pleadings.
731. Under general denial.
732. When evidence admissible of facts not pleaded.

DIVISION III.—VARIANCE

733. Rules and application.

DIVISION I.—ISSUES

§ 722. Kinds

"Issues arise on the pleadings, where a fact or conclusion of law is maintained by one party, and controverted by the other. There are two kinds: First, Of law. Second, Of fact." [83]

§ 723. Of law

"An issue of law arises upon a demurrer to the petition, answer or reply, or to some part thereof." [84]

§ 724. Of fact

"An issue of fact arises: First, upon a material allegation in the petition, controverted by the answer; or, second, upon new matter in the answer, controverted by the reply; or, third, upon new mat-

[82] Parks v. Monroe, 161 P. 638, 99 Kan. 368.

[83] Rev. Laws 1910, § 4989; General Electric Co. v. Sapulpa & I. Ry. Co., 49 Okl. 376, 153 P. 189; United States Fidelity & Guaranty Co. v. Fidelity Trust Co., 49 Okl. 398, 153 P. 195.

[84] Rev. Laws 1910, § 4990.

ter in the reply, which shall be considered as controverted by the defendant without further pleading." [85]

§ 725. Where both issues arise

Issues both of law and fact, may arise upon different parts of the pleadings in the same action. In such cases the issues of law must be first tried, unless the court otherwise direct." [86]

§ 726. Allegations deemed true

"Every material allegation of the petition, not controverted by the answer, and every material allegation of new matter in the answer, not controverted by the reply, shall, for the purposes of the action, be taken as true; but the allegation of new matter in the reply shall be deemed to be controverted by the adverse party, as upon direct denial or avoidance, as the case may require. A demurrer to a reply shall not be held to admit any of the facts alleged in such reply for any purpose other than to determine the sufficiency thereof. Allegations of value, or of amount of damages, shall not be considered as true, by failure to controvert them; but this shall not apply to the amount claimed in action on contract, express or implied, for the recovery of money only." [87]

[85] Rev. Laws 1910, § 4991.
[86] Rev. Laws 1910, § 4992.
[87] Rev. Laws 1910, § 4779.

Under Rev. Laws 1910, § 4779, allegations of value or amount of damages in a petition are not admitted as true by a failure to controvert them. Cudd v. Farmers' Exch. Bank of Lindsay, 76 Okl. 317, 185 P. 521.

Where, prior to the admission of the state into the Union, in replevin to recover certain personalty, in which plaintiffs claimed a special ownership under chattel mortgages, there was a nonverified answer with allegations that plaintiffs were a partnership and were transacting business under a fictitious name, a reply was necessary, and, none being filed, the material allegations of the new matter in the answer uncontroverted should be taken as true and constitute a complete defense. Baker v. L. C. Van Ness & Co., 105 P. 660, 25 Okl. 34.

Where plaintiff founds his claim to property on a certain note and chattel mortgage, and sets forth a copy of them in his original pleadings, and makes them a part thereof, and defendant does not deny their execution by affidavit, it is not necessary for plaintiff to prove that the note was unpaid. Hardwick v. Atkinson, 58 P. 747, 8 Okl. 608.

§ 727. —— Admissions

Defendant need not prove matters admitted in the petition;[88] but his act in challenging the competency of one of plaintiff's witnesses, upon the theory of the facts as alleged in the petition, is not such an admission of the truthfulness of the petition as renders proof unnecessary.[89] Likewise plaintiff is relieved from proving facts admitted by defendant in the answer.[90]

§ 728. Material allegation

"A material allegation, in a pleading, is one essential to the claim or defense, which could not be stricken from the pleading without leaving it insufficient." [91]

Division II.—Proof

§ 729. Proof required under certain pleadings—Verified denial

The issues raised by the pleadings determine the proof which is required.[92] A verified denial, however, is required to put certain facts in issue. It is necessary to put in issue plaintiff's corporate

[88] Where the execution of the deeds relied upon by the defendant in partition is admitted in plaintiff's pleading, the defendant need not introduce the deeds in evidence to establish his interest. Ryan v. Cullen, 133 P. 430, 89 Kan. 879.

Where, in an action to enjoin the collection of certain school district taxes, plaintiff admitted that the order for the levy had been made and that the county clerk had extended the levy, further proof that the levy had been ordered was unnecessary. St. Louis & S. F. Ry. Co. v. Lindsey, 39 Okl. 439, 135 P. 1053.

[89] McWilliams v. Piper, 53 P. 837, 7 Kan. App. 289.

[90] Where the answer admits execution of the note sued upon and pleads payment and set-off, the note need not be put in evidence. Dill v. Malot (Okl.) 167 P. 219.

In an action on an unindorsed note, payable to a third person, defendants' answer that the note was executed in consideration of a conveyance of lands by plaintiff admitted plaintiff's ownership of the note, and no proof is necessary, though it was denied by the answer. Choate v. Stander, 61 Okl. 148, 160 P. 737.

[91] Rev. Laws 1910, § 4780.

In an action on a negotiable certificate of deposit, an unverified answer denying plaintiff's ownership of the certificate and alleging that the deposit had been withdrawn by the true owner presents an issue for trial. Wichita Nat. Bank v. Maltby, 36 P. 1000, 53 Kan. 567.

[92] Where the defense in an action for the publication of libelous articles is that the articles are true, plaintiff is entitled to recover unless defendant establishes the truth of every material item. Spencer v. Minnick, 139 P. 130, 41 Okl. 613.

character,[93] or the existence of an alleged partnership,[94] or the execution of a written instrument.[95]

Although several facts are alleged in the petition, plaintiff need prove only such facts as are essential to establish his right to recover.[96] He must prove all material and necessary allegations,[97] but he need not prove a conclusion of law.[98] A slanderous statement need not be proven precisely as charged.[99]

An unnecessary allegation need not be proven. Thus, where an insurance company pleads a breach of condition against concur-

[93] Where defendant files specific verified denial of plaintiff's corporate character, plaintiff must prove such character. J. P. Bledsoe & Son v. Keystone Steel & Wire Co., 139 P. 257, 41 Okl. 586.

[94] Where the petition alleges the existence of a partnership, and the execution of a mechanic's lien, and a verified answer is filed denying "each and every allegation, averment, and statement contained in the plaintiff's petition," the existence of the partnership, and the due execution of the lien, are such issues as must be proved on the trial, to entitle the plaintiff to recover. Hayner v. Eberhardt, 15 P. 168, 37 Kan. 308.

[95] Felix v. Walker, 57 P. 128, 60 Kan. 467.

Where defendant alleged that he was induced by fraud to sign, without reading it, the contract sued on, and that it did not contain the real agreement, held, that evidence supporting such allegations was admissible. George O. Richardson Machinery Co. v. Duncan, 46 Okl. 21, 148 P. 80.

[96] Where plaintiff alleges several independent unconnected acts of negligence as ground for recovery and the proof is sufficient to establish any of such acts of negligence, he may recover. Dickinson v. Tucker (Okl.) 176 P. 949.

That the petition, in an action against a railroad company for damages from fire, unnecessarily charged negligence did not require plaintiff to prove negligence in order to recover. Midland Valley R. Co. v. Lynn, 38 Okl. 695, 135 P. 370.

In action for carrier's conversion of grain covered by bill of lading held by bank, where it paid into court the amount demanded, and an intervener claimed an interest in such money, proof of value of car was not necessary as between plaintiff and intervener. Marsh Milling & Grain Co. v. Guaranty State Bank of Ardmore (Okl.) 171 P. 1122, L. R. A. 1918D, 704.

[97] Under petition in action against railroad and its engineer and fireman, alleging that the latter willfully, wantonly, and maliciously blew a whistle with intent to frighten plaintiff's horse, no recovery could be had where the evidence showed no more than mere negligence of defendants. St. Louis & S. F. R. Co. v. Boush (Okl.) 174 P. 1036.

[98] St. Louis & S. F. R. Co. v. Johnson, 86 P. 156, 74 Kan. 83.

[99] Refusal to instruct that a recovery could be had on proving the slanderous statement precisely as charged in the petition held not error. Smith v. Gillis, 51 Okl. 134, 151 P. 869. It is sufficient to prove the substance of the identical words charged, or so many of them as may be sufficient to make out a case, without regard to structural combination not materially affecting the meaning of the actionable words. Id.

rent insurance, and the reply sets up a waiver, and the policy authorizes concurrent insurance, it is unnecessary to prove the alleged waiver.[1]

§ 730. Proof admissible under pleadings

Ordinarily the evidence must be confined to the issues raised by the pleadings;[2] but this rule will not be applied so as to work an injustice by excluding evidence because it only indirectly or partially supports the allegations.[3]

Evidence which may reasonably be held to have a bearing upon

[1] Springfield Fire & Marine Ins. Co. v. Null, 133 P. 235, 37 Okl. 665.

[2] Comanche Mercantile Co. v. Wheeler & Motter Mercantile Co., 55 Okl. 328, 155 P. 583; Winans v. Hare, 46 Okl. 741, 148 P. 1052; Frazier v. Ebenezer Baptist Church, 56 P. 752, 60 Kan. 404; Hartford Fire Ins. Co. v. Warbritton, 71 P. 278, 66 Kan. 93; Westchester Fire Ins. Co. v. Coverdale, 58 P. 1029, 9 Kan. App. 651; Chicago, R. I. & P. Ry. Co. v. Spears, 122 P. 228, 31 Okl. 469; Chambers v. Van Wagner, 123 P. 1117, 32 Okl. 774; Robieson v. Royce, 66 P. 646, 63 Kan. 886.

A tax deed, executed after the commencement of an action, and not put in issue, nor mentioned by the pleadings, cannot be introduced on trial. Campbell v. Fulmer, 18 P. 493, 39 Kan. 409.

A plaintiff, in his complaint, must state the facts constituting his cause of action, and is not at liberty to make out his case by giving in evidence facts which he has not stated in his complaint. Burke v. Levy, 8 P. 527, 68 Cal. 32; Nordholt v. Nordholt, 26 P. 599, 87 Cal. 552, 22 Am. St. Rep. 268; Kingman, P. & W. R. Co. v. Quinn, 25 P. 1068, 45 Kan. 477; Robbins v. Barton, 31 P. 686, 50 Kan. 120; Northern Pac. R. Co. v. O'Brien, 21 P. 32, 1 Wash. St. 599; Gilmore v. H. W. Baker Co., 41 P. 124, 12 Wash. 468.

Without pleading and proof of special damages for delay in transit of shipment, it was error to admit evidence of depreciation of value of merchandise after delivery to consignee, because he had to carry it over to another season. Wichita Falls & N. W. Ry. Co. v. D. Cawley Co. (Okl.) 172 P. 70.

Permitting plaintiff to testify that she became sick in consequence of being deprived by the conductor of her suit case, containing medicine, held error, where her petition did not ask special damages because thereof. Chicago, Rock Island & P. Ry. Co. v. Mailes, 52 Okl. 278, 152 P. 1131. The evidence in a passenger's action for injuries must be confined to the issues raised in the pleadings. Id.

In an action for damages to a shipment of cattle, held, that the admission of evidence on the issue of a waiver of terms of the shipment contract was error, where such issue was not raised by the pleadings. Atchison, T. & S. F. Ry. Co. v. Lynn & Hudson, 54 Okl. 701, 154 P. 657.

[3] In an action to recover on a note, a copy of which is set out in the petition, proof of loss of the note and of its execution and contents may be received, though no mention of the loss is made in the petition. Bare v. Ford, 87 P. 731, 74 Kan. 593, 118 Am. St. Rep. 336, 11 Ann. Cas. 251.

the issues should be admitted,[4] but evidence on a matter entirely distinct from anything in issue should be excluded.[5]

[4] In mandamus to compel the officers of a county to hold their offices at the county seat, when the answer puts in issue the legality of the election, all testimony tending to show fraud in receiving illegal votes or rejecting legal votes for either of the contesting towns is admissible. State v. Stock, 16 P. 106, 38 Kan. 154, rehearing denied 16 P. 799, 38 Kan. 184.

Where plaintiff and defendant, attorneys, were employed in action to recover land, and client was to pay one-quarter of value of land recovered, and, after recovery, conveyed one-quarter of land to defendant, and plaintiff sued to recover a one-half interest therein, wherein defendant denied plaintiff's interest, defendant's evidence that land was conveyed for services rendered by him, and not under contract of employment, was within issues and competent, and its exclusion was prejudicial error. Lamb v. Alexander (Okl.) 179 P. 587.

Where a petition against a carrier for damages to cattle charged rough and indifferent handling, by which the cattle were badly bruised, evidence that the cattle were badly bruised, by their being lugged about in the cars and jammed against the sides and ends of the cars, was within the issues. St. Louis & S. F. R. Co. v. Bilby, 130 P. 1089, 35 Okl. 589.

In action to set aside compromise of claim for seduction, where petition alleged that defendants misrepresented amount for which settlement could be made, testimony as to what girl's father told defendants regarding terms of settlement was admissible. Matthews v. McNeill, 157 P. 387, 98 Kan. 5. In action to set aside compromise of claim for seduction, where petition alleged that defendants falsely represented that girl became pregnant, doctor's testimony that she became pregnant was admissible. Id.

Petition and answer in an action for secret profits made by defendant in a real estate transaction, wherein he acted as plaintiffs' agent, held to raise a primary issue of agency. Gast v. Barnes, 44 Okl. 114, 143 P. 856.

Petition and answer in an action for wrongful death held to show without controversy that deceased was injured while employed by an express company, and not while employed by the defendant railway company, though the petition alleged that deceased was also engaged in handling personal baggage. Missouri, K. & T. Ry. Co. v. West, 38 Okl. 581, 134 P. 655.

Where a petition charges that a city negligently permitted a sidewalk to become out of repair so as to be dangerous, and negligently permitted it to remain in a dangerous condition, and the answer denies the allegations, it is not error to permit the plaintiff to prove that the defendant city had actual notice of the defects, or that it had been out of repair for such a length of time as to impute notice to the city. City of Guthrie v. Finch, 75 P. 288, 13 Okl. 496.

In railway mail clerk's action for personal injury, alleging that car was cold and unfit for occupancy, evidence that windows rattled and that doors were loose were admissible. St. Louis & S. F. R. Co. v. McClain, 63 Okl. 75, 162 P. 751.

Where plaintiff in ejectment claimed right of possession under a verbal agreement to convey land in settlement of a debt, and the proof showed that possession was taken under an agreement that the land should stand as se-

[5] See note 5 on following page.

If testimony is competent to sustain either one of two causes of action contained in a petition, it should be admitted.[6]

The fact that evidence relevant as to an issue raised by an

curity, either agreement was pertinent to the issue. Charpie v. Stout, 129 P. 1166, 88 Kan. 682, denying rehearing 128 P. 396, 88 Kan. 318. Declarations of the predecessor in title of plaintiffs in ejectment that the land in controversy should pass to defendants at her death were as competent to rebut a claim based on an agreement for sale as one based on an agreement for security. Id.

Where, in ejectment, defendant claims under deed from the plaintiff given to clear title upon payment of a debt to secure which the defendant had executed a deed to plaintiff, such claim does not preclude defendant from recovering upon a title held prior to the giving of such deed. Madden v. Stegman, 127 P. 524, 88 Kan. 29.

Where the petition in an action to recover for work and material and foreclosure of a mechanic's lien stated a cause of action for work and material, evidence may be received thereunder, though on its face it showed plaintiff was entitled to no lien. Uncle Sam Oil Co. v. Richards, 60 Okl. 83, 158 P. 1187.

Where petition negatived contributory negligence and answer alleged that if plaintiff received any injuries they were the result of her own negligence, the issue of contributory negligence was raised; reply denying that plaintiff's injuries were the result of her own negligence. Pioneer Telephone & Telegraph Co. v. Kophart, 59 Okl. 265, 159 P. 355.

In an action to cancel a deed, under a general allegation of forgery the grantor may show that the deed was placed in escrow with defendant with the space for the name of the grantee left blank, and that defendant, without authority, filled in his own name. Maclellan v. Seim, 46 P. 959, 57 Kan. 471.

[5] In action against domestic railway for injuries in another state, defense that plaintiff was not defendant's employé is not available under plea to jurisdiction of trial court. Wichita Falls & N. W. Ry. Co. v. Puckett, 53 Okl. 463, 157 P. 112.

In an action for the value of live stock, where there is no negligence alleged, and the only breach of contract pleaded is the loss of the live stock in New Mexico, it is error to admit evidence of injuries in Arizona; such issue not being raised by the pleadings. Atchison, T. & S. F. Ry. Co. v. Lambert, 123 P. 428, 32 Okl. 665. In an action for the loss of live stock shipped from Arizona to Oklahoma, where defendant pleaded provisions of a shipping contract as a defense and alleged that they were valid under the laws of Arizona, the exclusion of evidence of the laws of Arizona was error. Id.

Where the petition alleges specific acts of negligence, evidence tending to prove other negligent acts not embraced in the acts charged is not admissible. Missouri, O. & G. Ry. Co. v. Adams, 52 Okl. 557, 153 P. 200.

Evidence of a settlement under a compromise agreement held not admissible under a plea of payment. Continental Gin Co. v. Arnold, 52 Okl. 569, 153 P. 160.

In an action under Rev. St. U. S. § 5198 (U. S. Comp. St. § 9759), to recover

[6] Lyons v. Berlau, 73 P. 52, 67 Kan. 426.

answer was not relevant to an issue raised by the reply to a counterclaim did not render the evidence inadmissible.[7]

A plaintiff alleging ownership of property at a certain time is not restricted, as to the evidence of such ownership, to the day fixed in the petition, but may show ownership prior to such time.[8]

In an action for personal injuries, where defendant alleges contributory negligence and denies negligence generally, there is no admission of negligence limiting the issues to that of contributory negligence.[9]

Proof of ratification of the acts of an agent includes proof of agency and authority, and may be made under a pleading charging the ratified act to be that of the principal.[10]

Proof cannot be offered by the surety that the default of the principal was excused, unless the acts relied on to excuse the de-

the penalty provided for the payment of usurious interest, facts constituting accord and satisfaction cannot be proven under a general allegation of payment. First Nat. Bank v. Latham, 132 P. 891, 37 Okl. 286.

Where a real estate agent sues for commissions earned on a sale of land and relies on a special contract, it is error to admit evidence establishing a quantum meruit and to instruct that the jury may return a verdict for such sum as is customary for the services rendered. King v. Stephenson, 116 P. 183, 29 Okl. 29.

Where the petition declares merely on an express contract and pleads full performance thereof, recovery cannot be had on quantum meruit. Dunn v. T. J. Cannon Co., 51 Okl. 382, 151 P. 1167.

Where action is brought on insurance contract and petition alleges proof of loss was furnished, evidence of waiver of proof of loss is inadmissible. Hartford Fire Ins. Co. v. Mathis, 57 Okl. 332, 157 P. 134.

Where the petition pleaded that affirmative proofs of loss of time had been furnished, evidence that plaintiff wrote to the company, claiming indemnity, and that it replied, denying all liability, was not within the issues. Continental Casualty Co. v. Wynne, 129 P. 16, 36 Okl. 325.

Evidence of directions given by plaintiffs to their agent, relative to concentrating the converted property at a given point, held immaterial, where it was admitted by the pleadings that defendant was in possession when the suit was instituted. West Tulsa Belt Ry. Co. v. Bell, 54 Okl. 175, 153 P. 622.

Where bill of particulars seeks recovery for conversion, admission of evidence of breach of warranty by defendants is error. Pierce v. Barks, 60 Okl. 97, 159 P. 323.

In ejectment, where defendant claims possession under contract with plaintiff for purchase of the property, evidence of title on plaintiff's part becomes immaterial. Baldridge v. Centgraf, 108 P. 83, 82 Kan. 240.

[7] Mulhall v. Mulhall, 41 P. 577, 3 Okl. 252.

[8] Russell v. Bradley, 28 P. 176, 47 Kan. 438.

[9] Clemens v. St. Louis & S. F. R. Co., 131 P. 169, 35 Okl. 667.

[10] St. Louis & S. F. R. Co. v. Leger Mill Co., 53 Okl. 127, 155 P. 599.

fault, and which rendered the performance of the condition of the recognizance impossible, have been pleaded by such surety.[11]

The petition in a personal injury case must allege that obligations have been incurred for medical attention, hospital fees, and like items in the nature of special damages, to justify proof of such items.[12]

Incompetent testimony is not rendered competent by being set out in the pleadings, though the opposing party has failed to ask that it be stricken out.[13]

§ 731. —— Under general denial

A general denial puts in issue every material fact pleaded,[14] and any evidence is admissible under a general denial which controverts the facts denied.[15]

[11] Madden v. State, 10 P. 469, 35 Kan. 146.

[12] Revel v. Pruitt, 142 P. 1019, 42 Okl. 696.

[13] Ireton v. Ireton, 52 P. 74, 59 Kan. 92.

[14] First State Bank of Mannsville v. Howell, 137 P. 657, 41 Okl. 216; Same v. Lawson, 137 P. 661, 41 Okl. 226.

[15] Electric Ry., Light & Ice Co. v. Brickell, 85 P. 297, 73 Kan. 274; Lower v. Shorthill (Okl.) 176 P. 107.

In an action to recover damages for the failure of the defendant to deliver a quantity of corn which plaintiff claimed to have purchased from defendant at a stated time, and on certain terms, defendant filed a general denial. Under such an answer, defendant was entitled to offer any testimony which went to controvert the facts that the plaintiff was bound to establish in order to maintain his action. Davis v. McCrocklin, 8 P. 196, 34 Kan. 218.

Evidence that at date of the deed from plaintiff relied on by defendant in ejectment, and for his entire life, plaintiff was an idiot, held admissible under general denial with allegations of ownership. Hatfield v. Lotty, 48 Okl. 173, 149 P. 1171.

In action for damages for wrongful discharge, defendant, under a general denial, was entitled to introduce evidence controverting any fact which plaintiff was bound to prove. McKelvy v. Choctaw Cotton Oil Co. (Okl.) 178 P. 882. In action for damages for wrongful discharge, the breach of the contract was a necessary element in statement of his action which he was required to affirmatively prove. Id.

In action for damages for personal injuries, defense that person responsible for injury complained of was independent contractor is not affirmative one, and need not be specially pleaded, but is available under general denial. Gulf, C. & S. F. Ry. Co. v. Beasley (Okl.) 168 P. 200.

In an action against a sheriff for his refusal to levy a writ against property, the petition alleged that the debtor "had sufficient property and effects on which a levy might have been made to fully satisfy plaintiff's demand." To the petition a general denial was filed. The plaintiff's evidence tended to show the debtor's ownership of a stock of goods. Held, that evidence of chat-

Where defendant pleads as a defense the making of a written contract between himself and the plaintiff, but specifies no consideration, the law imports one, and, if the defense is only controverted in the reply by a general denial, the issue of consideration is not raised.[16] But a special defense must be pleaded to authorize the introduction of evidence thereon.[17]

Where a settlement of a debt is relied on as a defense it must be pleaded; proof thereof not being admissible under a general denial.[18]

Where an action is merely for an alleged existing balance due at the beginning of suit, without reference to the extent or amount of original liability, evidence of payment is admissible under the general denial.[19]

A verified general denial will not raise the issue of execution of

tel mortgage liens on the goods to an amount in excess of their value was admissible under the general denial. Phelps, Dodge & Palmer Co. v. Skinner, 65 P. 667, 63 Kan. 364.

In an action against an attorney for negligently failing to file appeal as agreed, defendant may, under a general denial, introduce evidence to rebut negligence. Tishomingo Electric Light & Power Co. v. Gullett, 52 Okl. 180, 152 P. 849.

Where, in an action for the balance due on a contract and for extras, defendant answers by general denial and by specifically denying liability for the extras it is error to exclude his evidence. Harris v. Warren-Smith Hardware Co., 44 Okl. 477, 144 P. 1050.

In an action of conversion, any evidence is admissible under a general denial which tends to disprove plaintiff's allegations; and it is not necessary, under Comp. Laws 1909, § 5634, to plead that the property converted was a gift inter vivos to defendant. Manning v. Maytubby, 141 P. 781, 42 Okl. 414.

[16] Avery Mfg. Co. v. Lambertson, 86 P. 456, 74 Kan. 304.

[17] General denial is insufficient in action on fire insurance policy to present issue of insured's willful burning of property. Springfield Fire & Marine Ins. Co. v. Griffin, 64 Okl. 131, 166 P. 431.

In an action on a fire insurance policy, evidence of waiver of proofs of loss is inadmissible, unless pleaded. Palatine Ins. Co. v. Lynn, 141 P. 1167, 42 Okl. 486.

Where the insurer did not specially plead as a defense pro tanto its reduced liability from the loss occurring while the building was vacant, such defense which was based on a condition subsequent, was not available. Liverpool & London & Globe Ins. Co. v. Cargill, 44 Okl. 735, 145 P. 1134.

A breach of warranty cannot be proved under a general denial, but must be specially pleaded. Standard Fashion Co. v. Morgan, 48 Okl. 217, 149 P. 1160.

[18] Roniger v. McIntosh, 137 P. 792, 91 Kan. 368.

[19] Jones v. El Reno Mill & Elevator Co., 110 P. 1071, 26 Okl. 796, Ann. Cas. 1912B, 486.

a written instrument, where in the same answer there is an admission of the execution.[20]

In ejectment, all defenses, legal and equitable, may be proven in evidence under a general denial.[21]

The question as to whether an Indian is an adult, and thereby competent to enter into a lease contract,[22] or whether he is competent to make a lease without the approval of the county court, and the questions as to his age, his quantum of Indian blood, and the alienability of his surplus and homestead allotment, constitute defensive matters, not available under a general denial.[23]

§ 732. When evidence admissible of facts not pleaded

Facts relied on to constitute waiver of proof of loss must be pleaded with particularity before evidence to establish same can be received,[24] as must also all acts, representations, and conduct relied on to constitute an estoppel.[25]

[20] Wilhite v. Dieball, 94 Kan. 78, 145 P. 854.

[21] Eller v. Noah (Okl.) 168 P. 819; Hurst v. Sawyer, 37 P. 817, 2 Okl. 470; Rowsey v. Jameson, 46 Okl. 780, 149 P. 880; Wiggins v. Powell, 152 P. 765, 96 Kan. 478; Armstrong v. Brownfield, 4 P. 185, 32 Kan. 116; Smith v. Hobbs, 31 P. 687, 49 Kan. 800; Adam v. Johnson, 65 P. 662, 63 Kan. 886.

In ejectment where the petition and answer set forth such facts and make such denials as are required by Code Civ. Proc. §§ 619, 620 (Gen. St. 1909, §§ 6214, 6215), either party may prove any fact which would tend to strengthen his own title or defeat that of his adversary as if the facts were fully pleaded, including those showing that the rights of either party were barred by limitations. Taylor v. Danley, 112 P. 595, 83 Kan. 646, 21 Ann. Cas. 1241.

[22] The question as to whether an Indian is an adult, and thereby competent to enter into a lease contract, or otherwise alienate his allotment, is defensive matter, not available to the defendant under a general denial. Mullen v. Carter (Okl.) 173 P. 512.

[23] In an action for rent, under the statute the question whether the Indian lessor was competent to make a lease without approval of the county court, and the questions as to his age, his quantum of Indian blood, and the alienability of his surplus and homestead allotment, constituted defensive matters not available under a general denial. Mullen v. Howard, 143 P. 659, 43 Okl. 531.

[24] Continental Ins. Co. v. Chance, 48 Okl. 324, 150 P. 114.

[25] Bunker v. Harding (Okl.) 174 P. 749.

Unless estoppel or waiver of conditions in a mutual fire insurance policy is distinctly pleaded by insured in action thereon, evidence thereof is inadmissible. Wolff v. German-American Farmers' Mut. Ins. Co., 60 Okl. 113, 159 P. 480.

In an action on a life policy, it was error to admit evidence tending to show such estoppel or waiver, where not pleaded. Fidelity Mut. Life Ins. Co. of Philadelphia, Pa., v. Dean, 57 Okl. 84, 156 P. 304.

In an action for injuries to plaintiff on the track, an ordinance limiting the speed of trains within the city limits may be admitted in evidence to show its violation by defendant as an element to establish actionable negligence, though not pleaded.[26]

Where, after the issues in an ejectment suit have been made up, defendants obtain a deed from plaintiff, and plaintiff claims on trial that the deed was procured through fraud, evidence thereof is admissible.[27]

Division III.—Variance

§ 733. Rules and application

In actions at law, in order to enable plaintiff to recover or defendant to succeed in his defense, the proof must not vary from what had been alleged in the pleadings.[28]

"Variance" means "difference," and it is no variance that the proof does not establish all the allegations of the petition.[29]

[26] Chicago, R. I. & P. Ry. Co. v. Martin, 141 P. 276, 42 Okl. 353.

[27] Davis v. Mimey, 60 Okl. 244, 159 P. 1112.

[28] Chambers v. Van Wagner, 123 P. 1117, 32 Okl. 774.

Where a broker sues to recover a commission on sale of realty, he cannot recover on the theory of damages from breach by the owner of his contract of sale. Robinson v. Oklahoma Fire Ins. Co., 55 Okl. 52, 155 P. 202. Under Rev. Laws 1910, § 4786, where the cause alleged is on a broker's contract for commission, and the proof shows it to be a cause for the defendant owner's breach of his contract to sell to the purchaser procured, there is not a variance, but a failure of proof. Id.

The plaintiff, in an action to set aside a deed and have a certain judgment declared a lien on the property was not entitled to recover, in the absence of proof that the judgment introduced in evidence had been recorded or docketed so as to become a subsisting lien. Lockoby v. Cook, 132 P. 142, 37 Okl. 419. Where, in an action to have a deed set aside and a certain judgment declared a lien on the property plaintiff introduced a judgment rendered in a different court for a different amount against different parties than that described in the petition, the variance was fatal in the absence of any amendment. Id.

A divorce should not be granted for acts of cruelty entirely different from those alleged in the petition. Winterburg v. Winterburg, 34 P. 971, 52 Kan. 406.

In an action on an account assigned to plaintiff in writing, in which the execution of the assignment is admitted by the pleading, it is not error for the court to refuse to admit the defendant to introduce evidence tending to show that such assignment is only colorable, and that the plaintiff is not the real party in interest, where no such defense is pleaded. Lesh v. Meyer, 66 P. 245, 63 Kan. 524.

[29] Red Ball Transfer & Storage Co. v. Deloe, 30 Okl. 522, 120 P. 575.

That a petition alleges more than has been proven is not fatal where the unproven allegations are not necessary to recovery, nor is it fatal that the testimony offered does not support certain allegations in the petition where it does support others sufficient to authorize a recovery.[30]

A departure between pleadings and proof is not disclosed, merely because the proof of essential allegations is not extended to cover unnecessary averments made in connection with them.[31]

Proof of a fact different from that stated in the pleadings, but not amounting to a failure of proof and to which no objection is made by the adverse party, is of no consequence.[32]

[30] Shawnee Light & Power Co. v. Sears, 95 P. 449, 21 Okl. 13.

Under Civ. Code, § 134 (Gen. St. 1909, § 5727), discrepancy between pleading that purchaser of land requested the seller to obtain as large loan as possible, after contract of sale was executed, and proof that request was made after agreement had been made, but before it was reduced to writing, was immaterial. O'Harro v. Akey, 158 P. 854, 98 Kan. 511.

Under Code Civ. Proc. § 134 (Gen. St. 1909, § 5727), declaring a variance immaterial unless misleading a party to his prejudice, a reply speaking in the name of a firm, and proof that one of the partners owned all the property and effects which were delivered to the defendant, are not in fatal variance. Danielson v. Scott, 129 P. 1190, 88 Kan. 789.

Where a petition alleged a will and the granting of letters testamentary to have been made in one county, it was not error to admit in evidence proof of probate and issue of testamentary letters by authenticated transcript from the probate court of another county, since this was an immaterial variance. Stout v. Crosby, 63 P. 661, 10 Kan. App. 580.

Where plaintiff, suing for personal injuries, pleads that certain items of medical expense have been paid, but offers to show that the items have been incurred, there is no variance prejudicial to rights of defendant, and exclusion of such offer is error. Sweet v. Henderson (Okl.) 178 P. 666.

[31] Bailey v. Gatewood, 74 P. 1117, 68 Kan. 231.

Immaterial variance between allegations and proof is not fatal, where there is sufficient evidence to show substantially the matters alleged. Russell v. Watts, 96 Kan. 275, 150 P. 600.

[32] Patterson v. Missouri, K. & T. Ry. Co., 104 P. 31, 24 Okl. 747.

Where a complaint in an action against a national bank as a stockholder in another corporation alleged that it acquired such stock in a particular manner, evidence that it was acquired in a different manner held not a fatal variance. First Nat. Bank v. Montgomery County Nat. Bank, 67 P. 458, 64 Kan. 134.

Where, in an action for money loaned, defendant answered that the money was invested in cattle in which the parties were partners, and the court found that the money loaned was invested in partnership cattle, and afterwards defendant agreed to take plaintiff's interest and repay the amount invested by him, and gave judgment for plaintiff, no objection having been made till after

In a broker's action for compensation, there was no variance between an allegation that it was understood that plaintiff should receive the usual and customary commission paid real estate agents and proof of a parol agreement without any stipulations as to the amount of the compensation, as it will be implied by law that plaintiff was to receive the customary or reasonable commission.[33]

Where a petition declares on both oral and written contracts concerning the same matter, and evidence shows oral contract, there is no variance between pleading and proof.[34]

A petition which alleges all the facts showing a cause of action and the amount of actual damages, but prays for treble damages which are not recoverable, does not prevent recovery of actual damages.[35]

A variance is not material, unless it has actually misled the adverse party.[36]

judgment, there was not a fatal variance. Mulhall v. Mulhall, 41 P. 109, 3 Okl. 304.

Where petition alleges contract and amount due thereunder, but is uncertain as to whether it was express or implied, and there was no objection for uncertainty, variance would not arise, because proof showed right to recover upon quantum meruit. Producers' Supply Co. v. Shirley (Okl.) 170 P. 504.

A petition on a fire policy alleged specific acts as a waiver of proof of loss and on the trial uncontradicted evidence was introduced, without objection, sufficient to show a waiver thereof, but upon other grounds. Held, that the petition would be considered as amended so as to conform to the proof, and a waiver so proved fairly in issue. St. Paul Fire & Marine Ins. Co. v. Mittendorf, 104 P. 354, 24 Okl. 651, 28 L. R. A. (N. S.) 651.

There is no material variance between an allegation that a railroad's employees knew that plaintiff was in a place of danger and proof that they should have known it. St. Louis & S. F. Ry. Co. v. Cole, 49 Okl. 1, 149 P. 872, L. R. A. 1915F, 866.

[33] Lowenstein v. Holmes, 40 Okl. 33, 135 P. 727.

[34] Royer v. Western Silo Co., 161 P. 654, 99 Kan. 309.

In an action by the mortgagor to compel the mortgagee to pay over the balance of the loan to secure which the mortgage was executed, which had been withheld by the mortgagee, plaintiff alleged that his cause of action was based on a verbal agreement, while his proof showed that the application for the loan was in writing, but that subsequently it was modified by parol before the loan was made. Held no variance. Kansas Loan & Trust Co. v. Love, 45 P. 953, 4 Kan. App. 188.

[35] Mohr v. Sands, 44 Okl. 330, 133 P. 238.

[36] Patterson v. Missouri, K. & T. Ry. Co., 104 P. 31, 24 Okl. 747; Guinan v. Readdy, 79 Okl. 111, 191 P. 602; Chicago, R. I. & P. Ry. Co. v. Bankers' Nat. Bank, 122 P. 499, 32 Okl. 290; People's Nat. Bank v. Myers, 69 P. 164, 65 Kan. 122.

A petition alleged a payment on account so as to toll limitations. The evi-

Where two causes of action are indefinitely stated in a petition, and the petition is not attacked by motion to separately state the causes of action, or to make more definite, it is not error to permit plaintiff during the trial to abandon one of the causes and proceed with the other.[37]

dence showed the indorsement of plaintiff's note by defendant, the discount of it by plaintiff at a bank, and the payment thereof when due by defendant. Held not a fatal variance. Benton v. Yurann, 55 P. 676, 8 Kan. App. 305.

There is no error in refusing to limit the inquiry as to the engine which injured plaintiff to an engine of a certain number, though that numbered engine was testified to as the one in question; the number of the engine not being essential, and the jury being authorized to find for plaintiff though they did not find that the engine that did the injury bore that number. Chicago Great Western Ry. Co. v. Troup, 80 P. 30, 71 Kan. 843.

An action in replevin was brought against a sheriff in his individual capacity and the evidence showed that the property was taken by him as sheriff as the property of a third person under an execution issued against such third person. Held, that there was not a fatal variance between the pleadings and the proof. Burchett v. Purdy, 37 P. 1053, 2 Okl. 391.

A variance in the description of a contract which must be construed the same, whether or not the variance existed, not changing its nature, will be disregarded. Lowenstein v. Holmes, 40 Okl. 33, 135 P. 727.

A variance between the original note and the copy attached to the petition, in that the former was dated March 25, 19—, and the latter March 25, 1910, was not material. Zeno v. Bazzell, 139 P. 281, 41 Okl. 574.

That the evidence as to date of conversion varied from the date alleged in the petition did not authorize the taking of such evidence from the jury. Missouri, O. & G. Ry. Co. v. Diamond, 48 Okl. 424, 150 P. 175.

[37] Hume v. Atkinson, 54 P. 15, 8 Kan. App. 18.

CHAPTER XII

DEPOSITIONS AND AFFIDAVITS

Sections
734–774. Article I.—Depositions.
775–780. Article II.—Affidavits.

ARTICLE I

DEPOSITIONS

Sections
734. Defined.
735. When taken.
736. Subpœna for deposition.
737. Contempt—Discharge.
738. Abuse of process.
739. Stipulation.
740. Before whom taken.
741. Depositions taken out of state.
742. Officer disinterested.
743. Commission.
744. Notice.
745. Publication notice.
746. Contempt—Refusal to testify.
747. Writing of depositions.
748. Filing.
749. Authentication.
750. Certificate.
751. When to be filed.
752. Fees for taking.
753. Exceptions.
754. Requisites and sufficiency.
755. To be decided before trial.
756. Incompetency and irrelevancy.
757. Motion to suppress—Form.
758. Objections at hearing.
759. Waiver of objections.
760. Perpetuating testimony.
761. Petition—Form.
762. Order for examining witnesses—Form.
763. Cross-interrogatories.
764. Before whom taken.
765. Filing and use—Costs.
766. Error waived by not excepting.
767. When deposition may be used.
768. Unavailability of witness.
769. Deposition as evidence.
770. May be read when.

Sections
771. Admission of part of deposition.
772. Copies.
773. Interpleader.
774. Forms.

§ 734. Defined

"A deposition is a written declaration, under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine, or upon written interrogatories." [1]

It may be given in narrative form.[2]

§ 735. When taken

"Either party may commence taking testimony by deposition at any time after service of summons upon the defendant." [3]

Depositions may be taken during the term at which the case is set for trial.[4]

It is not error for a notary before whom a deposition is to be taken to adjourn the taking of said deposition at the time and place named in the notice for taking the same until the next day, at the same place and hour, at the request of the attorney of the party taking the deposition,[5] though the opposing party does not appear.[6]

Where the next day is Sunday or a legal holiday, the adjournment should be to the next day thereafter; and this is true, though both Sunday and a legal holiday intervene.[7] But the deposition must be taken in accord with the notice or stipulation. For example, it is error to admit in evidence a deposition taken on the 5th day of the month instead of on the 3d, the time agreed on, when there is nothing to show a commencement of the deposition before the 5th, or that there was any continuance from the 3d to the 5th.[8]

[1] Rev. Laws 1910, § 5069.
[2] N. S. Sherman Machine & Iron Works v. R. D. Cole Mfg. Co., 51 Okl. 353, 151 P. 1181.
[3] Rev. Laws 1910, § 5074.
[4] Northrup v. Hottenstein, 16 P. 445, 38 Kan. 263; In re Merkle, 40 Kan. 27, 19 Pac. 401; St. Louis & S. F. Ry. Co. v. Morse, 16 P. 452, 38 Kan. 271.
[5] Babb v. Aldrich, 25 P. 558, 45 Kan. 218.
[6] Kelly v. Martin, 36 P. 705, 53 Kan. 380.
[7] Leach v. Leach, 27 P. 131, 46 Kan. 724.
[8] Peterson v. Albach, 32 P. 917, 51 Kan. 150.

§ 736. Subpœna for deposition

"When the attendance of the witness, before any officer authorized to take depositions, is required, the subpœna shall be issued by such officer." [9]

§ 737. Contempt—Discharge

A witness "imprisoned by an officer before whom his deposition is being taken, may apply to a judge of a court of record, who shall have power to discharge him, if it appears that his imprisonment is illegal." [10]

§ 738. Abuse of process

Taking the deposition of a party in a pending case merely to ascertain in advance what his testimony will be, and not for the purpose of using the same as evidence, is an abuse of judicial authority and process; and a party committed for refusing to give his deposition in such a case will be released on habeas corpus.[11]

§ 739. Stipulation

A stipulation of facts to avoid the taking of depositions does not enlarge or change the issues made by the pleadings.[12]

§ 740. Before whom taken

"Depositions may be taken in this state before a judge or clerk of a court of record, before a county clerk, justice of the peace, notary public, or before a master commissioner, or any person empowered by a special commission; but depositions taken in this state, to be used therein, must be taken by an officer or person whose authority is derived within the state." [13]

"The [Corporation] Commission is authorized to have depositions taken upon the application of either party to any cause pending before it, or upon its own motion; and to designate a person to take depositions under such rules and regulations as may be prescribed by the commission: Provided, that any party to a

[9] Rev. Laws 1910, § 5053.

[10] Rev. Laws 1910, § 5060.

[11] In re Davis, 16 P. 790, 38 Kan. 408; In re Cubberly, 18 P. 173, 39 Kan. 291.

[12] Brinkmeier v. Missouri Pac. Ry. Co., 105 P. 221, 81 Kan. 101, judgment affirmed 32 S. Ct. 412, 224 U. S. 268, 56 L. Ed. 758.

[13] Rev. Laws 1910, § 5075.

proceeding before the commission may take depositions in the same manner as in actions pending in the courts of the state." [14]

§ 741. Depositions taken out of state

"Depositions may be taken out of this state by a judge, justice or chancellor of any court of record, a justice of the peace, notary public, mayor or chief magistrate of any city or town corporate, or any person authorized by a special commission from this state." [15]

§ 742. Officer disinterested

"The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding." [16]

A notary public is not disqualified to take depositions by reason of the fact alone that he is the bookkeeper of the plaintiff.[17]

§ 743. Commission

"Any court of record of this state, or any judge thereof, is authorized to grant a commission to take depositions within or without the state. The commission must be issued to a person or persons therein named, by the clerk, under the seal of the court granting the same; and depositions under it must be taken upon written interrogatories, unless the parties otherwise agree." [18]

§ 744. Notice

"Prior to the taking of any deposition, unless taken under a special commission, a written notice, specifying the action or proceeding, the name of the court or tribunal in which it is to be used, and the time and place of taking the same, shall be served upon the adverse party, his agent or attorney of record, or left at his usual place of business or residence. The notice shall be served so as to allow the adverse party sufficient time, by the usual route of travel, to attend, and one day for preparation, exclusive of Sunday,

[14] Rev. Laws 1910, § 1203.
[15] Rev. Laws 1910, § 5076.
[16] Rev. Laws 1910, § 5077.
[17] Palmer v. Hudson River State Hospital, 61 P. 506, 10 Kan. App. 98.
[18] Rev. Laws 1910, § 5078.

and the day of service; and the examination may, if so stated in the notice, be adjourned from day to day." [19]

Where the caption of a notice to take depositions includes the name of the court and the title of the action, and the body of the notice specifies that the deposition to be taken is "to be used on the trial of the above-entitled action," it substantially complies with the requirement that the notice shall specify the action or proceeding, and the name of the court in which it is to be used.[20]

Depositions taken upon the notice prescribed are admissible whether taken within or without the state.[21]

A notice to take depositions need not set out the names of the witnesses.[22]

The adverse party has a right to be personally present at the taking of any deposition pursuant to notice.[23]

A notice which would require a party to start at midnight is insufficient,[24] as is also a notice requiring a party to use the day on which the deposition is to be taken in traveling to the place of taking.[25]

Where notices are served to take depositions at two or more places on the same day, the parties served may attend at either

[19] Rev. Laws 1910, § 5079.

In an action against a railroad company for the death of a stallion, occasioned by injuries received during shipment, a notice of taking depositions as to the condition of the stallion before shipment, served on a station agent, who has no authority in or connection with the cause, is not such notice as is contemplated by Code, § 352, providing that, prior to the taking of any deposition, notice shall be served on "the adverse party, his agent or attorney of record." Atchison, T. & S. F. R. Co. v. Sage, 31 P. 140, 49 Kan. 524.

A notice to take depositions is not "process," within the Kansas Code of Civil Procedure, which provides (section 68a) that every railroad company shall designate some person residing in each county into which the line runs, on whom "all process and notices issued by any court" may be served, and (section 68c) that on failure to designate such person "such process" may be served on any ticket agent in the county; and a notice to take depositions, served on a ticket agent, is insufficient. Atchison, T. & S. F. R. Co. v. Sage, 31 P. 140, 49 Kan. 524.

[20] Sparks v. Sparks, 32 P. 892, 51 Kan. 195.

[21] J. M. Hoard, Jr., Co. v. Grand Rapids Showcase Co. (Okl.) 173 P. 844.

[22] Dietrich v. Dr. Koch Vegetable Tea Co., 56 Okl. 636, 156 P. 188.

[23] Gillis v. First Nat. Bank of Frederick, 47 Okl. 411, 148 P. 994; Evans v. Rothschild, 39 P. 701, 54 Kan. 747.

[24] Helms v. Southwest Missouri R. Co., 152 P. 632, 96 Kan. 568.

[25] Hartley v. Chidester, 13 P. 578, 36 Kan. 363.

place and disregard the other notices, and depositions taken at places where he does not attend should be suppressed.[26]

Mere irregularities may be waived. For example, a deposition taken in the absence of the opposing party, a short distance from the place stated in the notice, will not be suppressed, where it appears that on the same day the counsel for the opposing party appeared, and by consent of all the deposition was opened, and the witness recalled and cross-examined.[27]

The designation of the place where the depositions are to be taken is sufficient, where it so describes it that it can be identified by the exercise of reasonable diligence.[28] It has been held that, in the absence of any showing of prejudice, a notice to take depositions that designates the place as "at the office of R. L. McDougal, in the city of Marysville, in the county of ———, in the state of Missouri," was sufficient.[29]

§ 745. Publication notice

"When the party against whom the deposition is to be read is absent from or a nonresident of the state, and has no agent or attorney of record therein, he may be notified of the taking of the deposition by publication. The publication must be made three consecutive weeks, in some newspaper printed in the county where the action or proceeding is pending, if there be any printed in such county, and if not, in some newspaper printed in this state, of general circulation in the county. The publication must contain all that is required in a written notice; and may be proved in the manner prescribed for service by publication at the commencement of the action." [30]

[26] Gillis v. First Nat. Bank of Frederick, 47 Okl. 411, 148 P. 994; Evans v. Rothschild, 39 P. 701, 54 Kan. 747.

[27] Southern Kansas Ry. Co. v. Robbins, 23 P. 113, 43 Kan. 145.

[28] The fact that the notice of a deposition specified that it would be taken at the office of "Dan. Ray," whereas the deposition showed that it was taken at the office of "Daniel E. Wray," does not render the notice misleading so as to invalidate the deposition where Wray was identified in the notice as an attorney at law of the place where the deposition was to be taken, and there was no other person of that name or having one sounding like it in that place. Sparks v. Sparks, 32 P. 892, 51 Kan. 195.

[29] Atchison, T. & S. F. R. Co. v. Pearson, 49 P. 681, 6 Kan. App. 825.

[30] Rev. Laws 1910, § 5080.

§ 746. Contempt—Refusal to testify

A witness may be punished for contempt for refusing to testify or answer questions propounded to him on the taking of his deposition, though he act on the advice of counsel.[31] The power to punish for contempt in such cases is vested in justices of the peace and judges of courts of record, including judges of county courts.[32]

§ 747. Writing of depositions

"The deposition shall be written in the presence of the officer taking the same, either by the officer, the witness or some disinterested person, and subscribed by the witness, or the deposition may be taken in shorthand by the officer or some disinterested person, and if so taken and after being transcribed shall be subscribed by the witness as though taken in long hand in the first instance." [33]

§ 748. Filing

"The deposition, so taken, shall be sealed up and indorsed with the title of the cause and the name of the officer taking the same, and by him addressed and transmitted to the clerk of the court where the action or proceeding is pending. It shall remain under seal until opened by the clerk by order of the court, or at the request of a party to the action or proceeding, or his attorney." [34]

Where all legal requisites have been complied with in sealing and indorsing depositions to be transmitted by mail, and where such depositions are actually received by the district clerk without being separated or mutilated, the mere fact that the envelope containing such depositions has been broken or injured during transmission will not justify a court in suppressing the depositions.[35]

Where an envelope containing a deposition is indorsed with the

[31] In re Merkle, 19 P. 401, 40 Kan. 27.

[32] Waugh v. Dibbens, 61 Okl. 221, 160 P. 589, L. R. A. 1917B, 360.

[33] Rev. Laws 1910, § 5081.

[34] Rev. Laws 1910, § 5082.

Depositions, the taking of which was begun before and completed after admission of state, held properly filed with the clerk of the district court to which the action was transferred. Scott v. Vulcan Iron Works Co., 122 P. 186, 31 Okl. 334.

[35] Commercial Nat. Bank v. Atkinson, 64 P. 617, 62 Kan. 775.

names of the plaintiff and defendant, and that of the officer before whom it was taken, and is addressed to the clerk of the district court where the case is pending, the title and cause are sufficiently described.[36]

§ 749. Authentication

"Depositions taken pursuant to this article, by any judicial or other officer herein authorized to take depositions, having a seal of office, whether resident in this state or elsewhere, shall be admitted in evidence, upon the certificate and signature of such officer, under the seal of the court of which he is an officer, or his official seal; and no other or further act of authentication shall be required. If the officer taking the same have no official seal, the deposition, if not taken in this state, shall be certified and signed by such officer, and shall be further authenticated, either by parol proof, adduced in court, or by the official certificate, and seal of the secretary of state or other officer of the state keeping the great seal thereof, or of the clerk or prothonotary of any court having a seal, attesting that such judicial or other officer was, at the time of taking the same, duly qualified, and acting as such officer. But if the deposition be taken within this state by an officer having no seal, or within or without this state under a special commission, it shall be sufficiently authenticated by the official signature of the officer or commissioner taking the same." [37]

§ 750. Certificate

"The officer taking the deposition shall annex thereto a certificate, showing the following facts: That the witness was first sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition was reduced to writing or taken in shorthand and transcribed by some proper person, naming him; that the deposition was subscribed in the presence of the officer certifying thereto; that the deposition was taken at the time and place specified in the notice." [38]

[36] Whittaker v. Voorhees, 15 P. 874, 38 Kan. 71: Babb v. Aldrich, 25 P. 558, 45 Kan. 218.

[37] Rev. Laws 1910, § 5085.

[38] Rev. Laws 1910, § 5086.

Where a notice states that the deposition will be taken at the storehouse of M., in Bismarck, Dakota territory, on the 13th day of April, between the

The certificate is defective, requiring the deposition to be suppressed, where it fails to show the place of taking and the adverse party was not present,[39] where it shows, relative to the oath taken, merely that deponents were sworn to testify the whole truth of their knowledge touching the matter in controversy,[40] and where it fails to state by whom the deposition was reduced to writing.[41] But mere informalities will be disregarded, and will not require that the deposition be suppressed, where the adverse party appeared by counsel at the taking of the deposition and cross-examined the witness.[42]

Failure to comply with additional provisions made by stipulation of the parties will not require that the depositions be suppressed.[43] Thus, that depositions were taken between 8 a. m. and 6 p. m., instead of 9 a. m. and 4 p. m., as stipulated in agreement, was not a ground for their suppression.[44]

Testimony "on information and belief" is not sufficient to overcome the certificate of a notary public before whom a deposition was taken that he was not an attorney for either party, or otherwise interested in the case.[45]

§ 751. When to be filed

"Every deposition intended to be read in evidence on the trial, must be filed at least one day before the day of trial." [46]

This means one clear day, both the day on which they are filed and the day of trial being excluded.[47] Where depositions are re-

hours of 8 a. m. and 6 p. m., and the certificate attached to the deposition states that it was taken at the store of M., in Bismarck, Dakota territory, on the 13th day of April, as specified in the notice attached, held, that "as specified in the notice" relates to the place, the day, and the hours of the day, as stated in the notice. Whittaker v. Voorhees, 15 P. 874, 38 Kan. 71.

[39] Dunham v. Holloway, 2 Okl. 78, 35 P. 949.

[40] Western Union Tel. Co. v. Collins, 25 P. 187, 45 Kan. 88, 10 L. R. A. 515; Atchison, T. & S. F. R. Co. v. Pearson, 49 Pac. 681, 6 Kan. App. 825.

[41] Atchison, T. & S. F. R. Co. v. Pearson, 49 P. 681, 6 Kan. App. 825.

[42] St. Louis & S. F. Ry. Co. v. French, 44 P. 12, 56 Kan. 584.

[43] Knapp v. American Hand-Sewed Shoe Co., 66 P. 996, 63 Kan. 698.

[44] Scott v. Vulcan Iron Works Co., 122 P. 186, 31 Okl. 334.

[45] Wagstaff v. Challiss, 1 P. 631, 31 Kan. 212.

[46] Rev. Laws 1910, § 5088; Chicago, R. I. & P. Ry. Co. v. Jackson, 63 Okl 32, 162 P. 823.

[47] Garvin v. Jennerson, 20 Kan. 371.

ceived in time, and the clerk fails to mark them "Filed," they should be received in evidence, if otherwise regular.[48]

Depositions may be treated as affidavits, and used in evidence in a hearing upon a motion, although they have not been on file one day before the time of such hearing.[49]

§ 752. Fees for taking

"The following fees shall be allowed for taking depositions in this state, viz.: Swearing each witness, ten cents; for each subpœna, attachment or order of commitment, fifty cents; for each hundred words contained in such deposition and certificate, fifteen cents, and no more; and such officer may retain the same until such fees are paid; such officer shall also tax the costs of the sheriff or other officer who shall serve the process aforesaid, and fees of the witnesses, and may, also, if directed by the person entitled thereto, retain such deposition until the said fees are paid." [50]

There is no merit in exceptions to a deposition on the ground that the attorney procuring its taking inclosed therewith a letter containing a statement of the fees to the notary public, witnesses, and stenographer.[51]

§ 753. Exceptions

"Exceptions to depositions as a whole shall be in writing, specifying the grounds of objections, and filed with the papers in the cause before the commencement of the trial." [52]

It is no excuse for failure to comply with this statute that counsel for the party taking the deposition opened same and has ever since had it in his possession.[53]

An objection to a deposition, because a United States revenue stamp is not attached, must be made in writing and filed before the commencement of the trial,[54] as must exceptions to depositions on the ground that the notice did not properly specify the action.[55]

Where depositions are filed on day of but before trial, as known

[48] Hogendobler v. Lyon, 12 Kan. 276.
[49] Bank of Santa Fe v. Haskell County Bank, 53 P. 132, 59 Kan. 354.
[50] Rev. Laws 1910, § 5089.
[51] Chicago, R. I. & P. Ry. Co. v. Jackson, 63 Okl. 32, 162 P. 823.
[52] Rev. Laws 1910, § 5090.
[53] Bagg v. Shoenfelt (Okl.) 176 P. 511.
[54] MacRae v. Kansas City Piano Co., 68 P. 54, 64 Kan. 580.
[55] Clark v. Ellithorpe, 51 P. 940, 7 Kan. App. 337.

to party against whom they are to be used, and where both parties announce ready, and such party does not request additional time to file exception, he waives time allowed by statute, and a formal verbal objection when depositions are offered is properly overruled.[56]

§ 754. —— Requisites and sufficiency

Where a party desires to object to a deposition, he must specify each question or answer on which he desires a ruling, and the particular grounds thereof, unless he objects to the admissibility of the deposition as a whole, in which case he should specify the grounds therefor; a general objection is insufficient to exclude the entire deposition because a part was incompetent.[57]

An objection to a deposition, based on the fact that the name of the officer taking it is not indorsed on the envelope, containing it, is not pointed out by an objection that the deposition was not sealed up by the officer taking it.[58]

§ 755. —— To be decided before trial

"The court shall, on motion of either party, hear and decide the questions arising on exceptions to depositions as a whole, before the commencement of the trial." [59]

§ 756. —— Incompetency and irrelevancy

Objections to the taking of depositions other than for incompetency and irrelevancy are waived, unless made and filed before the trial;[60] but the objections of incompetency and irrelevancy may be made on the trial, without written objection filed before the trial.[61]

Such objections should be heard and decided usually during the progress of the trial. The court can properly refuse to hear them before the trial commences.[62]

By appearing at the taking of the deposition of an adverse witness, and not objecting to his testimony on the ground that it is in-

[56] Wichita Falls & N. W. Ry. Co. v. Davern (Okl.) 177 P. 909.
[57] State v. Simmons, 88 P. 57, 74 Kan. 799.
[58] Neosho Valley Inv. Co. v. Hannum, 66 P. 631, 63 Kan. 621.
[59] Rev. Laws 1910, § 5092.
[60] Root v. Coyle, 82 P. 648, 15 Okl. 574; Rockford Ins. Co. v. Farmers' State Bank, 31 P. 1063, 50 Kan. 427.
[61] In re Schaffner's Estate, 141 P. 251, 92 Kan. 570.
[62] Tays v. Carr, 14 P. 456, 37 Kan. 141.

competent, a party does not waive the right to make such objection at the trial of the case, when such deposition is offered in evidence.[63]

An objection to the incompetency of a witness making a deposition, not reaching the incompetency or irrelevancy of the evidence given by him, should not be heard where no written exception to the deposition is filed.[64]

§ 757. Motion to suppress—Form

A motion to suppress depositions must be in writing and be made before trial. It is error to entertain such a motion after the jury has been impaneled and sworn.[65] A motion to suppress a deposition must clearly point out the objection.[66]

Depositions will not be suppressed, because not certified, sealed, indorsed, transmitted, and opened as required by law, unless such grounds are set up in motion to suppress, and unless record supports such ground.[67]

Where portions of a deposition are admissible, the deposition should not be suppressed;[68] nor should a deposition be suppressed because the officer taking it does not certify that he is not related to either of the parties, unless there is some affirmative showing of such relationship.[69]

It has been held not error to overrule a motion to quash a second deposition, where it did not appear that the question and answer in the original deposition differed from those in defendant's possession and used in cross-examination at the trial.[70]

Where a deposition is taken without notice, and the opposing party cross-examines the witness, and the testimony is taken by a stenographer and transcribed and read by the witness and subscribed in the presence of the officer, no objection being made to the manner of taking the deposition that the deposition was not

[63] Griffith v. McCandless, 59 P. 729, 9 Kan. App. 794.
[64] Crebbin v. Jarvis, 67 P. 531, 64 Kan. 885.
[65] St. Louis & S. F. Ry. Co. v. Morse, 16 P. 452, 38 Kan. 271; Welch v. Church, 55 Okl. 600, 155 P. 620; Bagg v. Shoenfelt (Okl.) 176 P. 511.
[66] Neosho Valley Inv. Co. v. Hannum, 66 P. 631, 63 Kan. 621.
[67] Oklahoma Hay & Grain Co. v. T. D. Randall & Co. (Okl.) 168 P. 1012.
[68] Griggs v. Corson, 81 P. 471, 71 Kan. 884.
[69] Eldridge v. Compton, 30 Okl. 170, 119 P. 1120, Ann. Cas. 1913B, 1055.
[70] Chicago, R. I. & P. Ry. Co. v. Jackson, 63 Okl. 32, 162 P. 823.

written in the officer's presence will be deemed waived, and cannot be raised for the first time to suppress the deposition.[71]

Overruling a motion, presented after the jury was sworn, to suppress depositions on the ground that the evidence was incompetent and hearsay, and reserving a ruling on the evidence till offered at the trial, is proper practice.[72]

MOTION TO SUPPRESS DEPOSITION

(Caption.)

Comes now the above named defendant, C. D., and moves the court to suppress the deposition of E. F., taken on behalf of the plaintiff, A. B., and filed herein on the ——— day of ———, 19—, for the following reasons, to wit:

1. That the notice to take said deposition was not served on this defendant in the manner required by law.

2. That sufficient time was not allowed between the time of the alleged service and the taking of said deposition to allow this defendant to attend, by the usual route of travel, and one day for preparation, exclusive of Sunday and the day of such alleged service.

3. That said deposition shows that it was not taken on the ——— day of ———, 19—, the date stated in the notice, but was taken one day later, on the ——— day of ———, 19—.

4. That the certificate to said deposition does not show that said witness, E. F., was first duly sworn to testify the truth, the whole truth, and nothing but the truth.

(Other reasons, if any.) X. Y., Attorney for Defendant.

§ 758. Objections at hearing

"Where the adverse party appears at the taking of the deposition, no objections to questions propounded therein shall be considered unless stated at the time and set forth in the deposition: Provided, that it may be otherwise stipulated by the parties at the time of taking the deposition, and such stipulation set forth in the deposition and certified to by the officer taking the same." [73]

[71] Trower v. Roberts, 30 Okl. 215, 120 P. 617.
[72] Hilt v. Griffin, 90 P. 808, 77 Kan. 783.
[73] Rev. Laws 1910, § 5091.

An objection on the trial to the introduction of evidence contained in a deposition must state the particular evidence objected to.[74]

Objection to questions and answers in deposition, taken when objector did not appear at the taking thereof, should be interposed when question or answer is offered in evidence by the taker.[75] But where both parties were represented at the taking, and there was no objection to the questions and answers, objections made to the questions at the trial should not be entertained.[76]

§ 759. Waiver of objections

Where a deposition is taken in the absence of the opposing party, nothing is waived, and the absent party has the right to presume that the deposition will be taken in strict conformity with the statute.[77]

Where a deposition has been read in evidence at one trial, without objection, it is too late thereafter to raise purely technical objections apparent on the face of the deposition prior to the first trial.[78]

Where a plaintiff in an action takes testimony by deposition, and much of such testimony is hearsay, and incompetent, and the defendant offers and reads such deposition to the jury, he cannot be heard to complain of the testimony which he himself offers.[79]

§ 760. Perpetuating testimony

The perpetuation of testimony is permitted only to prevent a failure of justice.[80]

"The testimony of a witness may be perpetuated in the manner hereinafter provided." [81]

§ 761. —— Petition—Form

"The applicant shall file in the office of the clerk of the district court a petition, to be verified, in which shall be set forth, specially, the subject-matter relative to which testimony is to be taken, and the names of the persons interested, if known to the applicant; and

74 Gano v. Wells, 14 P. 251, 36 Kan. 688.
75 Hart v. Frost (Okl.) 175 P. 257.
76 Oklahoma State Bank v. Buzzard (Okl.) 175 P. 750.
77 Atchison, T. & S. F. R. Co. v. Pearson, 49 P. 681, 6 Kan. App. 825.
78 Eldridge v. Compton, 30 Okl. 170, 119 P. 1120, Ann. Cas. 1913B, 1055.
79 Roller v. James, 49 P. 630, 6 Kan. App. 919.
80 Guinan v. Readdy, 79 Okl. 111, 191 P. 602.
81 Rev. Laws 1910, § 5116.

if not known, such general description as he can give of such persons, as heirs, devisees, alienees or otherwise. The petition shall also state the names of the witnesses to be examined, and the interrogatories to be propounded to each; that the applicant expects to be a party to an action in a court of this State, in which such testimony will, as he believes, be material, and the obstacles preventing the immediate commencement of the action, where the applicant expects to be plaintiff." [82]

PETITION FOR PERPETUATING EVIDENCE

In re Application of A. B. to Perpetuate Evidence.

Comes now A. B., and respectfully represents and shows to the court:

1. That your petitioner, A. B., expects to be a party to an action in a court of this state, involving the title to the following described real estate: (Describe same.)

2. That the names of all the persons who are or will be interested in said action are, so far as the same are known to your petitioner, as follows: (Naming them.)

3. That your petitioner believes that the testimony of C. D., and E. F., of ———, will be material in said action, relative to (state subject-matter relative to which testimony is desired to be taken).

4. That your petitioner desires that the testimony of said witnesses concerning said matters be perpetuated, so that the same may be available in said action, if any such action shall ever be begun, and desires that same witnesses be examined and the following interrogatories be propounded to each of said witnesses: (Set forth interrogatories to be propounded.)

Wherefore your petitioner prays the court to make an order allowing the examination of said witnesses, and fixing the time and place of said examination and the time and manner in which the parties interested shall be notified thereof, and that upon such examination the interrogatories above set forth be propounded to each of said witnesses and their answers thereto taken, and that the depositions of said witnesses when so taken be filed in this court.

(Verification.) X. Y., Attorney for Petitioner.

[82] Rev. Laws 1910, § 5117.

§ 762. —— Order for examining witnesses—Form

"The court, or a judge thereof, in vacation, may forthwith make an order allowing the examination of such witnesses. The order shall prescribe the time and place of the examination, how long the parties interested shall be notified thereof, and the manner in which they shall be notified." [88]

ORDER FOR EXAMINING WITNESSES TO PERPETUATE TESTIMONY

In re Application of A. B. to Perpetuate Evidence.

Upon reading and filing the attached verified petition of A. B. to perpetuate evidence, it appearing to the court that said petitioner expects to be a party to an action in a court of this state involving the title to the real estate therein described, and that the testimony of C. D. and E. F., of ———, will be material to said action:

It is ordered that the —— day of ———, 19—, at the hour of ——— o'clock ——— M., at ——— in the city of ———, in the county of ——— and state of ———, be and the same is hereby fixed as the time and place when the deposition of said witnesses shall be taken, and that ——— of the county of ——— and state of ———, is hereby commissioned, authorized, and empowered to take said depositions, and that at said time and place said commissioner shall propound to each of said witnesses the interrogatories set forth in the attached petition, and set down in writing their answers thereto. It is further ordered that a copy of this order shall be personally served on ———, the parties interested in the subject-matter of said depositions, at least ——— days before said depositions are to be taken, and that said parties, if they so desire, may file herein such cross-interrogatories as they desire propounded to said witnesses, such cross-interrogatories to be filed herein on or before the ——— day of ———, 19—, and that said cross-interrogatories, if any there be, shall be propounded to said witnesses, and their answers thereto taken in the same manner as the interrogatories of the petitioner herein. It is further ordered that said depositions, when so taken, shall be returned by said commissioner to the court clerk of this court, for the approval of this court.

Dated ———. ———, Judge.

[88] Rev. Laws 1910, § 5118.

§ 763. —— Cross-interrogatories

"When it appears satisfactorily to the court or judge that the parties interested cannot be personally notified, such court or judge shall appoint a competent attorney to examine the petition, and prepare and file cross-interrogatories to those contained therein. The witnesses shall be examined upon the interrogatories of the applicant, and upon cross-interrogatories, where they are required to be prepared, and no others shall be propounded to them; nor shall any statement be received which is not responsive to some one of them. The attorney filing the cross-interrogatories shall be allowed a reasonable fee therefor, to be taxed in the bill of costs." [84]

§ 764. —— Before whom taken

"Such depositions shall be taken before some one authorized by law to take depositions, or before some one specially authorized by the court or judge, and shall be returned to the office of the clerk of the court in which the petition was filed." [85]

§ 765. —— Filing and use—Costs

"The court or judge, if satisfied that the depositions have been properly taken, and as herein required, shall approve the same and order them to be filed; and if a trial be had between the parties named in the petition, or their privies or successors in interest, such depositions or certified copies thereof may be given in evidence by either party, where the witnesses are dead or insane, or where attendance for oral examination cannot be obtained or required; but such depositions shall be subject to the same objections for irrelevancy and incompetency as may be made to depositions taken pending an action.[86]

"The applicant shall pay the costs of all such proceedings." [87]

§ 766. Error waived by not excepting

"Errors of the court in its decisions upon exceptions to depositions, are waived, unless excepted to." [88]

§ 767. When deposition may be used

"The deposition of any witness may be used only in the following cases:

[84] Rev. Laws 1910, § 5119.
[85] Rev. Laws 1910, § 5120.
[86] Rev. Laws 1910, § 5121.
[87] Rev. Laws 1910, § 5122.
[88] Rev. Laws 1910, § 5093.

"First. When the witness does not reside in the county where the action or proceeding is pending or is sent for trial by change of venue, or is absent therefrom.

"Second. When, from age, infirmity or imprisonment, the witness is unable to attend court or is dead.

"Third. When the testimony is required upon a motion, or in any other case where the oral testimony of the witness is not required." [89]

§ 768. —— Unavailability of witness

"When a deposition is offered to be read in evidence, it must appear to the satisfaction of the court that for some legal cause the attendance of the witness cannot be procured." [90]

Hence a deposition cannot be read in evidence when the deponent is in court and capable of being examined.[91]

It is error to permit the use of the deposition of a resident of the county where it is not shown that his presence at the trial cannot be had.[92]

No person can be compelled to attend for examination on the trial of a civil action except in the county of his residence; and the fact that a witness is temporarily in or passing through another county at the time and place of the trial therein is no objection to the reading of his deposition previously taken for use at such trial.[93]

Where a witness does not reside in a county where a trial of a civil action is to be held, and his deposition is regularly taken in the county of his residence, and filed in the district court of the proper county, it is not a good objection, when the deposition is offered, merely to state "that the witness has been in attendance upon the court, and is at present, it is believed, on his way to the place of trial." [94] It is not prejudicial error to admit deposition of

[89] Rev. Laws 1910, § 5073.
[90] Rev. Laws 1910, § 5087.
[91] Chicago, K. & W. R. Co. v. Prouty, 40 P. 909, 55 Kan. 503.
[92] Chicago, K. & N. Ry. Co. v. Brown, 24 P. 497, 44 Kan. 384; Frankhouser v. Neally, 39 P. 700, 54 Kan. 744; Atchison, T. & S. F. R. Co. v. Snedeger, 49 P. 103, 5 Kan. App. 700.
[93] Waite v. Teeters, 14 P. 146, 36 Kan. 604.
[94] Eby v. Winters, 33 P. 471, 51 Kan. 777.

resident of county usually employed outside the state, where both parties have used their best efforts to compel his attendance.[95]

When a witness is not herself suffering from an infirmity at the time of trial, the fact that, at the time of the taking of a deposition, she was in attendance upon her sick husband is not ground for the admission of such deposition.[96]

On petition after adjournment to vacate a judgment on the ground of fraud, perjury, conspiracy, etc., the rule applies that affidavits and depositions cannot be used as original evidence when the witness is present in court.[97]

§ 769. Deposition as evidence

"The deposition taken pursuant to this article shall be admitted in evidence on the trial of any civil action or proceeding, pending before any justice of the peace, mayor or other judicial officer, arbitrator or referee." [98]

§ 770. May be read when

"When a deposition has been once taken, it may be read in any stage of the same action or proceeding, or in any other action or proceeding upon the same matter between the same parties, subject, however, to all such exceptions as may be taken thereto under the provisions of this article." [99]

A deposition taken at the instance of one party to an action, and not used by him, may, if competent, be read in evidence by the opposite party, against the objection of the party at whose instance it was taken.[1]

Where a party takes a deposition on notice as provided by law, but does not file it in court, it is not error to refuse to order the deposition to be brought into court where the application is made for the first time during the progress of the trial.[2]

In an action to set aside a deed, where plaintiff took the deposition of a grantee, and filed it in court, but did not offer it in evidence,

[95] Griffith v. Midland Valley R. Co., 100 Kan. 500, 166 P. 467.
[96] Boise v. Atchison, T. & S. F. R. Co., 51 P. 662, 6 Okl. 243.
[97] Fullenwider v. Ewing, 1 P. 300, 30 Kan. 15.
[98] Rev. Laws 1910, § 5083.
[99] Rev. Laws 1910, § 5084.
[1] Rucker v. Reid, 13 P. 741, 36 Kan. 468.
[2] Martin v. Chicago, R. I. & P. Ry. Co., 105 P. 451, 81 Kan. 344, 27 L. R. A. (N. S.) 164.

taking of the deposition was waiver of any objection to defendants' testimony, and the deposition might properly be read in evidence on behalf of the defendant grantee.[3]

§ 771. Admission of part of deposition

Where answers to questions on direct examination in a deposition are inadmissible and are excluded, the cross-examination on the subject-matter so excluded is equally inadmissible.[4]

A portion of a deposition is admissible in evidence without the remainder, if the portion so introduced is all deponent said on the subject to which such portion relates, and, in the absence of a showing to the contrary, it will be presumed that such was the case.[5]

Permission to a party to offer in evidence part of a deposition only, is not error where the adverse party is permitted to use all or any part of the deposition as evidence.[6]

§ 772. Copies

Where the original of a deposition duly taken and filed with the clerk of court is lost, a copy thereof, transcribed and attested by the witness producing it, may be admitted as secondary evidence of its contents.[7]

When a deposition is taken in a foreign jurisdiction, and the witness produces a record and submits it to the notary, who takes a copy, such copy is admissible on a reading of the deposition.[8]

§ 773. Interpleader

Where a party obtained permission to file an interplea in a case where depositions are taken and are on file, he is bound with the knowledge of the condition of the record, and such depositions should not be excluded for the reason that the interpleader was not served with notice of their taking.[9]

[3] Golder v. Golder, 102 Kan. 486, 170 P. 803.
[4] Bertenshaw v. Laney, 94 P. 805, 77 Kan. 497.
[5] Mecartney v. Smith, 62 P. 540, 10 Kan. App. 580; Sealey v. Smith (Okl.) 197 P. 490.
[6] Oklahoma State Bank v. Buzzard (Okl.) 175 P. 750.
[7] Gilmore v. Butts, 59 P. 645, 61 Kan. 315.
[8] McCord-Collins Mercantile Co. v. Dodson, 121 P. 1085, 32 Okl. 561; T. D. Turner & Co. v. Dodson, 121 P. 1087, 32 Okl. 566.
[9] Miller v. Campbell Commission Co., 74 P. 507, 13 Okl. 75.

§ 774. Forms

NOTICE TO TAKE DEPOSITIONS

(Caption.)

The said plaintiff (or defendant), A. B., and his attorney of record X. Y., will take notice that on the ——— day of ———, A. D. 19—, the defendant (or plaintiff) above named will take the deposition of sundry witnesses to be used as evidence on behalf of the defendant (or plaintiff) in the trial of the above entitled cause, at (state office or street number), in the city of ———, in the county of ———, in the state of ———, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned and continued from day to day, at the same place between the same hours, until they are completed.

G. H., Attorney for Defendant (or Plaintiff).

Service of the above notice is hereby acknowledged to have been made on plaintiff (or defendant) the ——— day of ———, 19—.

X. Y., Attorney for Plaintiff (or Defendant).

AFFIDAVIT OF SERVICE

State of Oklahoma, } ss.:
——— County. }

G. H., being duly sworn, states that he made service of the within notice on the plaintiff, A. B., by delivering to X. Y., his attorney of record, a duplicate thereof at ———, State of Oklahoma, on ——— day of ———, 19—. G. H.

Subscribed in my presence, and sworn to before me, ———, this ——— day of ———, 19—.

———.

HEADINGS TO DEPOSITIONS

Depositions of witnesses taken to be used in an action pending in the ——— court, within and for the county of ———, in the state of Oklahoma, wherein ——— is plaintiff, and ——— is defendant. In pursuance to the notice hereto attached and at the time and place therein stated, the said ———, plaintiff, appeared in ——— own behalf (or by ———, attorney) and the said ———, defendant, in ——— own behalf (or by ———, attorney, or if the adverse party does not appear nothing need be said as to his appearance), and thereupon the said ——— produced the following witnesses in or-

der to wit: ———, of lawful age, who, being first duly sworn, deposeth and saith ———; also ———, who, being first duly sworn, deposeth and saith, etc. (Where the witness is examined by questions the form will be as the above, adding, after "saith," in reply to the interrogatories pronounced, to wit, etc.)

CERTIFICATE ATTACHED TO DEPOSITION

I, ——— (justice of the peace, judge, notary, etc.) within and for the county of ———, in the state of Oklahoma, do hereby certify that the above named ———, the witnesses whose names are severally subscribed to the foregoing depositions were by me first duly sworn (or affirmed) to testify the truth, the whole truth, and nothing but the truth, in the case aforesaid, and that the depositions by them respectively subscribed were reduced to writing by ———, who is not attorney for or related to either of said parties or otherwise interested in the event of said action or proceeding, and subscribed by the respective witnesses in my presence, and the same were taken on the ——— day of ———, A. D., 19—, between the hours of 8 o'clock a. m. and 6 o'clock p. m., of said day at the office of ———, in the town of ———, in the county of ——— and ——— of———, as specified in the notice thereto attached, and I am not attorney for or related to either of said parties or otherwise interested in the event of said action.

ENDORSEMENT ON ENVELOPE

In the ——— Court of ——— County, State of Oklahoma.

———, Plaintiff.
v.
———, Defendant.

To the Court Clerk of ——— County, State of Oklahoma, ——— Oklahoma.
ss.: Signed ———.
(Deposition taken by me)
(Seal) Title of officer ———.

ARTICLE II

AFFIDAVITS

Sections

775. Definition.
776. Use.
777. Jurat.
778. Before whom taken.
779. By whom made.
780. Forms.

§ 775. Definition

"An affidavit is a written declaration, under oath, made without notice to the adverse party." [10]

§ 776. Use

"An affidavit may be used to verify a pleading, to prove the service of a summons, notice or other process in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, or in any other case permitted by law." [11]

An affidavit may be used only in the cases enumerated in this statute and in chancery proceedings, unless specially authorized by law. It cannot be used in evidence where an issue is made and triable.[12]

Where in specific performance, the plaintiff had furnished the defendant an abstract showing title, ex parte affidavits accompanying the abstract to show who were the heirs of a decedent were held admissible.[13]

To be used as evidence an affidavit should state facts positively, and not merely on belief.[14]

When a verified petition is used as an affidavit, its allegations must be construed as those of an affidavit, and must be such statements of fact as would be proper in the oral testimony of a witness. Allegations which are simply conclusions of law, whether sufficient or not as matter of pleading, are incompetent as testimony.[15]

[10] Rev. Laws 1910, § 5068.
[11] Rev. Laws 1910, § 5071.
[12] Watkins v. Grieser, 11 Okl. 302, 66 P. 332.
[13] Harrel v. Neef, 102 P. 838, 80 Kan. 348.
[14] Shanholtzer v. Thompson, 103 P. 595, 24 Okl. 198, 138 Am. St. Rep. 877.
[15] State v. Missouri & K. Tel. Co., 77 Kan. 774, 95 P. 391.

§ 777. Jurat

The statutory certificate for the authentication of depositions, cannot be used on an ordinary affidavit, and no form of jurat to be appended to such affidavits is prescribed by the Code.[16]

The fact that a notary public, before whom a claim of mechanic's lien is verified, fails to add after his official signature the date of the expiration of his commission, does not render such lien void; since the statute requiring such addition on the part of the notary does not attempt to avoid the affidavit on account of such omission, but simply subjects the notary to a penalty therefor.[17]

The words, "subscribed and sworn to before me," in the certificate of the officer before whom an affidavit is made, are a sufficient compliance with the statute.[18]

If a declaration has been made under oath it is an affidavit though no jurat be attached, the jurat being simply evidence that an oath was duly administered.[19]

When a paper purporting to be an affidavit has been approved by the court as such, and has been the basis of judicial action as if authenticated, the omission of the jurat is a mere irregularity which will not expose the proceeding to collateral attack.[20]

§ 778. Before whom taken

"An affidavit may be made in and out of this State, before any person authorized to take depositions, and must be authenticated in the same way, except as provided for the verification of pleadings." [21]

It is improper for a lawyer to take acknowledgments to affidavits, to be used in the trial of a case in which he is the attorney.[22] Such affidavit is voidable, on being assailed for that reason,[23] but it may be amended,[24] and, when amended and filed, it will relate back to the original affidavit.[25]

[16] James v. Logan, 108 P. 81, 82 Kan. 285, 136 Am. St. Rep. 105.
[17] Phelps & Bigelow Windmill Co. v. Baker, 30 P. 472, 49 Kan. 434.
[18] Pallady v. Beatty, 15 Okl. 626, 83 P. 428.
[19] Id.
[20] Id.
[21] Rev. Laws 1910, § 5072.
[22] Crawford v. Ferguson, 115 P. 278, 5 Okl. Cr. 377, 45 L. R. A. (N. S.) 519.
[23] Shanholtzer v. Thompson, 103 P. 595, 24 Okl. 198, 138 Am. St. Rep. 877.
[24] Swearingen v. Howser, 14 P. 436, 37 Kan. 126.
[25] Board of Com'rs of Cheyenne County v. Walter, 112 P. 599, 83 Kan. 743.

§ 779. By whom made

Where a statute requires an affidavit to be made by the judgment creditor or his attorney, such affidavit cannot be made by an agent not an attorney.[26]

§ 780. Forms

AFFIDAVIT

State of Oklahoma,
County of ———. } ss.:

A. D., being first duly sworn, upon oath alleges and states: (Set forth the facts concisely.) A. D.

Subscribed and sworn to before me this ——— day of ———, 19—.

(If before notary, add:) J. B., (Official Title.)

My commission expires ———, 19—.

[26] In re Heath, 19 P. 926, 40 Kan. 333.

CHAPTER XIII

TRIAL

Sections
781–795. Article I.—In general.
796–801. Article II.—Argument and conduct of counsel.
802–824. Article III.—Issues and trial thereof.
802. Division I.—Issues in general.
803–824. Division II.—Taking case or question from jury.

ARTICLE I

IN GENERAL

Sections
781. Definition.
782. Time of trial.
783. Waiver of right.
784. Docket.
785. Copy for bar.
786. Presence of judge.
787. Presence of parties and attorneys.
788. Conduct and remarks of judge.
789. Consolidation.
790. Separate trials—Several defendants.
791. Reporter—Duties.
792. Order of trial—Issues—Damages—Motions—Objections.
793. Waiver of right to object.
794. Issues—Trial by court or jury.
794a. Trial by court.
794b. Agreed statement of facts.
795. Submission without suit.

§ 781. Definition

"A trial is a judicial examination of the issues, whether of law or fact, in an action." [1]

§ 782. Time of trial

"Actions shall be triable at the first term of court, after or during which the issues therein, by the time fixed for pleading are, or shall have been made up. When the issues are made up, or when the defendant has failed to plead within the time fixed, the cause shall be placed on the trial docket, and if it be a trial case shall stand for trial at such term ten days after the issues are made up,

[1] Rev. Laws 1910, § 4988.

and shall, in case of default, stand for trial forthwith. When any demurrer shall be adjudged to be frivolous the cause shall stand for hearing or trial in like manner as if an issue of fact had been joined in the first instance." [2]

When the issues have been fully made up, this statute has spent its force, and any subsequent change in the issues does not necessarily work a delay of the trial.[3]

Where a party to an action deliberately puts himself in default, so far as he is concerned, the action may be tried at any time thereafter.[4]

[2] Rev. Laws 1910, § 5043; Conwill v. Eldridge, 130 P. 912, 35 Okl. 537.

Where one defendant joined issue and another appeared at a term and adopted the answer of his codefendant on condition that case immediately proceed to trial, it was reversible error to overrule plaintiffs' motion to strike case from trial docket and to compel them to go to trial over their objection. Harn v. Interstate Building & Loan Co. (Okl.) 172 P. 1081.

Civ. Code Prac. § 315, provides for the making out of the trial docket 10 days before the first day of the term. A demurrer to a petition was overruled and leave to answer given. Held, that the case was not triable on the issues of fact joined at the term of the court when such ruling was made. City of Eureka v. Ross, 67 P. 849, 64 Kan. 372.

Upon the overruling of a motion to quash a summons and set aside the service, if it appears that the motion is not made in good faith or is frivolous, it is within the discretion of the court to continue the case for the term, or to assign it for hearing at the same term; reasonable time being given to make up the issues. Jones v. American Cent. Ins. Co., 109 P. 1077, 83 Kan. 44. Where the question of law raised on a motion to quash a summons and set aside the service had been determined by the court about 16 years before the motion was filed, and 22 days were given to make up the issues and prepare for trial, the court did not abuse its discretion in assigning the case for hearing at the same term after overruling the motion. Id.

Where defendants were required over their objection to defend the cause upon its merits at a term when it was not triable except by consent, and before the issues were framed, a new trial ought to be granted. Harris v. Anthony Salt Co., 45 P. 58, 57 Kan. 24.

[3] King v. King, 141 P. 788, 42 Okl. 405.

A case stands for trial when issues have been made up for 10 days, and a motion directed to defendant's answer, filed beyond the time allowed for filing pleadings, does not revive operation of statute. Blackert v. Lankford (Okl.) 176 P. 532.

Any subsequent change in issues by new or amended pleadings does not necessarily work a delay of trial. Childs v. Cook (Okl.) 174 P. 274; Swope v. Burnham, 52 P. 924, 6 Okl. 736.

A motion directed to the answer, after the time allowed for filing pleadings and more than ten days after the issues have been made up, does not prevent the cause from standing for trial. Chicago, R. I. & P. Ry. Co. v. Pitchford, 44 Okl. 197, 143 P. 1146.

[4] Herman v. Gardener, 103 Kan. 659, 175 P. 971.

When a nonfrivolous demurrer has been overruled, the case is not triable on issues of fact until 10 days after the filing of the answer.[5]

The trial of an issue of fact, and the assessment of damages, in any case, shall be in the order in which they are placed on the trial docket, unless the court, in its discretion, shall otherwise direct.[6]

§ 783. —— Waiver of right

The right of a litigant under this statute is waived by failing to object that the case is improperly set for trial, and moving for a continuance for absence of witnesses.[7] Such right is waived where defendant announces ready for trial;[8] also where, upon a case being called, both parties announce ready and a jury is impaneled and sworn and defendant amends with leave.[9]

§ 784. —— Docket

"A trial docket shall be made out by the clerk of court, at least twelve days before the first day of each term of the court, and the actions shall be set for particular days in the order prescribed by the judge of the court, and so arranged that the cases set for each day shall be considered as nearly as may be on that day."[10]

§ 785. —— Copy for bar

"The clerk shall make out a copy of the trial docket for the use of the bar, before the first day of the term of court and cause the same to be printed."[11]

§ 786. Presence of judge

During the trial it is error for trial judge to absent himself from trial room so as to lose immediate and instant control of proceedings.[12]

[5] City of Ardmore v. Orr, 129 P. 867, 35 Okl. 305.
[6] Burr v. Honeywell, 51 P. 235, 6 Kan. App. 783.
[7] Conwill v. Eldridge, 130 P. 912, 35 Okl. 537.
[8] Chicago, R. I. & P. Ry. Co. v. Pitchford, 44 Okl. 197, 143 P. 1146.
[9] Oklahoma Trust Co. v. Stein, 136 P. 746, 39 Okl. 756.
[10] Rev. Laws 1910, § 5040.
[11] Rev. Laws 1910, § 5041.
[12] Peters Branch of International Shoe Co. v. Blake (Okl.) 176 P. 892.

§ 787. Presence of parties and attorneys

When a cause is regularly set for trial, it is not the duty of the court to call counsel when absent, and it is no abuse of discretion to proceed to trial when the cause is reached, where no postponement has been taken, and no leave of absence has been granted to parties or their counsel.[13]

§ 788. Conduct and remarks of judge

The jury is the exclusive judge of the weight to be given the testimony of any witness, and a remark or the demeanor of the trial judge amounting to an opinion as to the truthfulness of a witness is reversible error.[14]

The court should not by his remarks mislead a party into believing that the decision will be in his favor,[15] but may reprimand a party for trifling with the court,[16] and may make mention of an obvious fact.[17] He may reprimand a witness who, contrary to

[13] North v. Hooker (Okl.) 172 P. 77; Buchanan v. Fireman's Ins. Co. of Newark, N. J., 146 P. 411, 94 Kan. 132.

It is no abuse of discretion to proceed to trial in the absence of one of the parties or his counsel, where no postponement had been granted or permission given to be absent. Linderman v. Nolan, 83 P. 796, 16 Okl. 352; Comstock-Castle Stove Co. v. Galland, 49 P. 690, 6 Kan. App. 831.

[14] City of Newkirk v. Dimmers, 87 P. 603, 17 Okl. 525.

[15] During the progress of a trial to the court, the judge informed defendant, before he had introduced all his evidence, that the court was ready to decide the case without further evidence, and that he did not think additional testimony would affect the decision, but would hear anything of a different nature from that already offered. The evidence preponderated largely in favor of defendant, and the decision of the court was against him. Held, that the remarks of the court had a tendency to mislead defendant into the belief that the decision would be in his favor, and prevent him from having a fair and impartial trial, and a new trial should be granted. Harrison v. Harrison, 29 P. 572, 48 Kan. 443.

[16] When plaintiff asks for continuance after jury is called, on the ground that he is too ill to be present at the trial, but on examination states that he is able to be about town, and finally that he is able to proceed to trial, and then asks for delay to call his witnesses to determine whether he will ask for a continuance on account of absent witnesses, it is not improper for the court to characterize his conduct as trifling. Krapp v. Hauer, 16 P. 702, 38 Kan. 430.

[17] Where the depositions of a witness for both parties were palpably conflicting, it was not prejudicial error for the court to remark that the witness "must be an awful liar." Connor v. Wilkie, 41 P. 71, 1 Kan. App. 492.

In an action against a levying officer for conversion, a remark of the court to counsel for plaintiff that he was trying the case as though defendant were

its admonition, persists in making voluntary statements not elicited by his examination.[18]

It is error for the court to comment in the presence of the jury on the effect answers to special questions will have on the rights of the parties.[19]

A remark of the court that he was going to take a recess, and that he was tired of lawyers questioning witnesses and objecting to everything, did not constitute reversible error.[20]

§ 789. Consolidation

An application for the consolidation of actions is a matter within the discretion of the trial court.[21]

§ 790. Separate trials—Several defendants

"A separate trial between the plaintiff and any or all of several defendants may be allowed by the court, whenever justice will be thereby promoted." [22]

It is within the discretion of a trial court to allow separate trials to the several defendants, or to refuse the same.[23] Its ruling will never be reversed unless it can be clearly seen that it abused its discretion.[24]

a common thief, trying to get away with somebody's property does not require a reversal. Cone v. Smyth, 45 P. 247, 3 Kan. App. 607.

[18] Ætna Life Ins. Co. v. Kramer (Okl.) 165 P. 179.

[19] Atchison, T. & S. F. R. Co. v. Ayers, 42 P. 722, 56 Kan. 176.

[20] Love v. Reynolds, 128 P. 242, 36 Okl. 297.

[21] Readicker v. Denning, 122 P. 103, 86 Kan. 617, judgment reversed on rehearing 125 P. 29, 87 Kan. 523.

[22] Rev. Laws 1910, § 4995.

[23] Herbert v. Wagg, 117 P. 209, 27 Okl. 674.

The allowance of a separate trial is wholly within the discretion of the trial court. Gregg v. Berkshire, 62 P. 550, 10 Kan. App. 579.

Where persons in possession of separate parts of tract without common interest are joined in ejectment for whole tract, and where defendants rely upon different sources of title, the court may order separate trials. Mullen v. Carter (Okl.) 173 P. 512.

[24] Hoskinson v. Bagby, 27 P. 110, 46 Kan. 758.

In suit to recover real estate, commission alleging a conspiracy between vendor and purchaser, wherein vendor filed a cross-petition against purchaser, the refusal of separate trials of the issues was a proper exercise of trial court's discretion. Prather v. Eden, 171 P. 635, 102 Kan. 545.

In an action to recover damages occasioned by negligently setting out a fire, in which a partnership, which was engaged in operating a railroad in connection with a railroad company, was made defendant jointly, with the railroad company, it is not prejudicial error, nor an abuse of discretion, for

§ 791. Reporter—Duties

The statute making it the duty of the court reporter to take down in shorthand all the proceedings upon the trial of any cause, as well as statements of counsel, does not contemplate that the entire argument of the counsel to the jury should be taken down, but applies to all statements which counsel have a right to have taken down concerning the cause which might be properly made a part of the case made for appeal.[25]

The matters which counsel may demand taken down by the stenographer at the trial, are only such as may properly be made part of the case-made, and do not include matters foreign to the case being tried.[26]

It is error for county court to refuse to permit stenographer to incorporate in records of trial all exceptions that attorney may desire to reserve to action of court in giving or refusing instructions.[27]

Under the statute, the court on request must require the court reporter to take and transcribe evidence.[28]

§ 792. Order of trial—Issues—Damages—Motions—Objections

"The trial of an issue of fact, and the assessment of damages in any case, shall be in the order in which they are placed on the trial docket, unless by the consent of the parties or the order of the court they are continued or placed at the heel of the docket, unless the court, in its discretion, shall otherwise direct. The court may, in

the trial court to refuse a separate trial to such partnership, for the reason that a different rule as to the burden of proof applies to them than to the railroad company, under the statute, where the evidence establishing the origin of the fire, and the culpable negligence of the parties in starting it, is clear, convincing and undisputed. Latham v. Brown, 29 P. 400, 48 Kan. 190.

In an action on a promissory note against two defendants, one the guarantor, and the other the maker, the latter pleaded want of consideration and the fraud of his co-defendant in procuring the note as a defense, and asked that the note sued on be declared void, and that he have judgment against his co-defendant for the amount he had been obliged to pay in settlement of another note given at the same time and in the same transaction with the one sued on. Held, that said guarantor's demand for a separate trial of the issues between himself and the maker of the note was properly overruled. Crane v. Cox, 49 P. 796, 6 Kan. App. 405.

[25] Dickinson v. Whitaker, 75 Okl. 243, 182 P. 901; Rev. Laws 1910, § 1786.

[26] Dabney v. Hathaway, 51 Okl. 658, 152 P. 77.

[27] Methvine v. Fisher (Okl.) 166 P. 702; Anoatubby v. Pennington, 46 Okl. 221, 148 P. 828.

[28] Cherry v. Brown, 79 Okl. 215, 192 P. 227.

its discretion, hear at any time a motion, and may by rule prescribe the time for hearing motions." [29]

This statute vests a large discretion in the trial court to dispose of the causes in such order as will most speedily dispose of the business before the court.[30]

Calling a case which stands on a day's calendar for trial without notice to the attorney is no abuse of discretion, where no request is made for postponement and no permission to be absent has been given.[31]

"When the jury has been sworn, the trial shall proceed in the following order, unless the court for special reasons otherwise directs:

"First. The party on whom rests the burden of the issues may briefly state his case, and the evidence by which he expects to sustain it.

"Second. The adverse party may then briefly state his defense, and the evidence he expects to offer in support of it.

"Third. The party on whom rests the burden of the issues must first produce his evidence; after he has closed his evidence the adverse party may interpose and file a demurrer thereto, upon the ground that no cause of action or defense is proved. If the court shall sustain the demurrer, such judgment shall be rendered for the party demurring as the state of the pleadings or the proof shall demand. If the demurrer be overruled, the adverse party will then produce his evidence.

"Fourth. The parties will then be confined to rebutting evidence unless the court, for good reasons in furtherance of justice, permits them to offer evidence in the original case.

"Fifth. When the evidence is concluded and either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered, and signed by the party or his attorney asking the same, and delivered to the court. The court shall give general instructions to the jury, which shall be in writing, and be numbered, and signed by the judge, if required by either party.

"Sixth. When either party asks special instructions to be given to the jury, the court shall either give such instructions as re-

[29] Rev. Laws 1910, § 5042.
[30] Linderman v. Nolan, 83 P. 796, 16 Okl. 352.
[31] Lindsy v. Goodman, 57 Okl. 408, 157 P. 344.

quested, or positively refuse to do so; or give the instructions with modification in such manner that it shall distinctly appear what instructions were given in whole or part, and in like manner those refused, so that either party may except to the instructions as asked for, or as modified, or to the modification, or to the refusal. All instructions given by the court must be signed by the judge; and filed together with those asked for by the parties as a part of the record.

"Seventh. After the instructions have been given to the jury the cause may be argued." [32]

The definition, timeliness, requisites, form, entry, materiality, and withdrawal of exceptions is treated elsewhere.[33]

§ 793. —— Waiver of right to object

Where a party voluntarily goes to trial upon all the issues tendered, this objection that the statutory order of procedure was not observed, made at the time of the motion for a new trial, is too late.[34]

Any error in trying issues between plaintiff, a garnishee, and intervening claimants, before the entry of judgment against the principal defendant, is waived by proceeding to trial without objection or request for delay.[35]

§ 794. Issues—Trial by court or jury

"Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided." [36]

"All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by jury, or referred as provided in this Code." [37]

[32] Rev. Laws 1910, § 5002.
[33] See post, § 2409 et seq.
[34] Smith v. Smith, 89 P. 896, 75 Kan. 847.
[35] Greenwood County Bank v. O. B. Walker Telephone Co., 128 P. 357, 88 Kan. 287.
[36] Rev. Laws 1910, § 4993.
[37] Rev. Laws 1910, § 4994.

§ 794a. Trial by court

"The provisions of this article respecting trials by jury apply, so far as they are in their nature applicable to trials by the court." [38]

"Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its findings, except generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing, the conclusions of fact found, separately from the conclusions of law." [39]

The refusal of the court to state findings of fact in writing and conclusions of law on them, when requested so to do by either party to a suit, before judgment, is reversible error.[40] But a party cannot

[38] Rev Laws 1910, § 5039.

[39] Rev. Laws 1910, § 5017.

The fact that findings of fact and conclusions of law were prepared by counsel at the request of the court, and, after an examination, were adopted, is not objectionable. Howard v. Howard, 34 P. 1114, 52 Kan. 469.

It is proper for the trial court to call on the attorney of the successful party to write out findings of fact in the case in accordance with the decision as announced orally. English v. English, 35 P. 1107, 53 Kan. 173.

Where the facts have been found at the trial, but are not reduced to writing when judgment is rendered, they may thereafter be written out by the court, by agreement of the parties, and filed as of the date of the judgment. Randolph v. Campbell, 47 P. 560, 5 Kan. App. 880. An agreement by the parties that the findings of fact may be written out and filed after the date of the judgment cannot be established by parol, but must be shown by a duly-recorded order of court made pursuant to the agreement. Id.

[40] Rogers v. Bonnett, 37 P. 1078, 2 Okl. 553; Bryan v. Okmulgee County Business Men's Ass'n (Okl.) 176 P. 226; Insurance Co. of North America v. Taylor, 124 P. 974, 34 Okl. 186; Thompson v. Russell, 32 P. 56, 1 Okl. 225.

Under the express provisions of Rev. Laws 1910, § 5017, the district court, on a trial without a jury, should on request find the material facts established by the evidence, so that exceptions may be taken to its view of the law involved in the trial. Allen v. Wildman, 38 Okl. 652, 134 P. 1102.

On trial of a question of fact by the district court, it must, on request find the material facts established by the evidence, so that exceptions may be taken to its views of the law involved in the trial. Shuler v. Lashhorn, 74 P. 264, 67 Kan. 694.

In a suit to abate a mill dam, which subjects the plaintiff's land to overflow, and for damages, the court may make findings of fact in addition to those made by the jury. Drinkwater v. Sauble, 26 P. 433, 46 Kan. 170.

Refusal on timely request to make findings of fact on material issuable matters put in issue by the pleading and on which evidence was introduced held error. Nordman v. Johnson, 146 P. 1125, 94 Kan. 409.

Where a case is tried to the court, it is error to refuse to make separate

dictate how a fact shall be found,[41] though he can and should make a proper and timely request.[42] It is not necessary for the court to

findings requested, or to make them so definite that the party may have a fair opportunity to except on the conclusions of law involved. Vickers v. Buck's Stove & Range Co., 79 P. 160, 70 Kan. 584.

A party to an action tried by the court without a jury is entitled, on request, to have all or any of the issuable facts on which there is any evidence found separate from the conclusions of law. Seward v. Rheiner, 43 P. 423, 2 Kan. App. 95.

Rev. Laws 1910, § 5017, as to separate findings of law and fact, where requested, was intended to enable parties to have placed on record the facts on which litigated rights depend, as well as court's conclusions of law, so that exceptions thereto may be taken. Coleman v. James (Okl.) 169 P. 1064.

In an action without a jury, the court was asked to state its findings of fact and conclusions of law separately, and acceded to the request, but subsequently declined to make such findings and conclusions. Held, that the record showing that the refusal was made with the consent of the plaintiff in error was not ground of error. Salls v. Barons, 20 P. 485, 40 Kan. 697.

It is the duty of the court to comply with a request at the commencement of a trial to prepare findings of fact and conclusions of law, and if such finding state in separate paragraphs the facts presented so that they may be readily understood, and so it will be apparent what conclusions were reached and the facts upon which such conclusions were founded, it will be deemed a sufficient compliance with the request, though some of the paragraphs contain a compound of fact and law, and do not in every instance separate with technical accuracy the findings of fact from the conclusions of law. Harper v. Harper, 113 P. 300, 83 Kan. 761.

[41] Caulk v. Lowe (Okl.) 178 P. 101.

Where, in a trial without a jury, the court states the findings and conclusions contemplated by statute, error cannot be predicated on the court's refusal to answer questions of fact. M. R. Smith Lumber Co. v. Russell, 144 P. 819, 93 Kan. 521.

[42] Right of parties under Rev. Laws 1910, § 5017, to require special finding of facts and separate conclusions of law, is waived, where no request is made until after court has announced general findings and conclusions. German State Bank of Elk City v. Ptachek (Okl.) 169 P. 1094.

In the absence of a special request for a finding on a material issue in a case, it is not error for the court to fail to make such finding. Kellogg v. Bissantz, 32 P. 1090, 51 Kan. 418.

A request to the court to state separately findings of fact and conclusions of law is too late, when made after the conclusion of the trial, and after a general finding has been announced. Allen v. Dodson, 17 P. 667, 39 Kan. 220.

Where, in an action tried by the court without a jury, the judgment is rendered on March 30, 1885, and the motion for a new trial is not argued and decided until April 25, 1885, and no request or intimation is given to the court by either party that it is desirable that the court should state its conclusions of fact and law separately, in writing, before it announces its findings, and not until the motion for a new trial is overruled and final judgment entered, the request is made too late, and the court commits no error in refusing, upon a

state its findings, except generally, unless a request therefor was made.[43]

The trial court's findings of fact, reasonably supported by evidence, will not be disturbed.[44]

A general finding is a special finding of everything necessary to sustain it.[45] It has the weight of a verdict.[46] But the court's opinion does not constitute a finding of fact within this rule.[47]

request made at such time, to state in writing its findings. Wilcox v. Byington, 12 P. 826, 36 Kan. 212.

Where the trial of a case is submitted to the court without a jury, the court may find generally, and without stating its conclusions of fact found separately from its conclusions of law, unless requested to find specially before the general finding is made, and the judgment rendered thereon. Smythe v. Parsons, 14 P. 444, 37 Kan. 79.

Judgment will not be reversed for trial court's failure to make detailed special findings of fact, where no findings were presented by parties, and where court makes special findings, somewhat general in nature, but covering all issues involved in action. Harris v. Morrison, 163 P. 1062, 100 Kan. 157.

A party violating a rule of court that an application for separate findings of fact and conclusions of law shall be made before the introduction of evidence cannot complain of the failure to comply with an untimely request for separate findings of fact and conclusions of law. Smith v. City of Washington, 141 P. 250, 92 Kan. 646.

[43] Cook v. State, 130 P. 300, 35 Okl. 653.

[44] Union Sav. Ass'n v. Cummins, 78 Okl. 265, 190 P. 869.

Findings of fact and conclusions of law made in a will contest held too general to meet requirements of Rev. Laws 1910, § 5017. Coleman v. James (Okl.) 169 P. 1064.

[45] Miller v. Thompson, 80 Okl. 70, 194 P. 103; Myers v. Hubbard, 80 Okl. 97, 194 P. 433; Weaver v. Drake, 79 Okl. 277, 193 P. 45; Elwood Oil & Gas Co. v. Gano, 76 Okl. 287, 185 P. 443; Theodore Maxfield Co. v. Andrus, 56 Okl. 247, 155 P. 1163; Shenners v. Adams, 46 Okl. 368, 148 P. 1023; Deskins v. Rogers (Okl.) 180 P. 691; In re Hoover's Estate, 104 Kan. 635, 180 P. 275; Gorman v. Carlock (Okl.) 179 P. 38; Jackson v. Bates (Okl.) 170 P. 897; Davis v. First State Bank of Norman, 51 Okl. 498, 152 P. 122; Conner v. Warner, 52 Okl. 630, 152 P. 1116; Limestone Rural Telephone Co. v. Best, 56 Okl. 85, 155 P. 901; Shawnee Life Ins. Co. v. Watkins, 53 Okl. 188, 156 P. 181; Tripp v. Deupree, 60 Okl. 47, 158 P. 923; Schafer v. Midland Hotel Co., 137 P. 664, 41 Okl. 111; J. I. Case Threshing Mach. Co. v. Lyons & Co., 138 P. 167, 40 Okl. 356; D. J. Faour & Bros. v. Morad, 139 P. 833, 40 Okl. 597; Wrought Iron Range Co. v. Leach, 123 P. 419, 32 Okl. 706; Funk v. Shawnee Fire Ins. Co., 125 P. 35, 87 Kan. 568; Brady v. Farmers' Co-op. Creamery & Supply Co., 154 P. 220, 97 Kan. 13.

A general finding in favor of a prior settlement made of property rights by

[46] Barnett v. Barnett, 78 Okl. 249, 189 P. 743.

[47] Rogers v. Harris, 76 Okl. 215, 184 P. 459.

Findings of the trial court must be read as a whole to determine their sufficiency.[48]

Where the court makes a general finding for plaintiff and certain special findings, but fails to cover all the issues involved, and defendant fails to call attention to the omission, his right to complain of omission is waived.[49] However, where the findings of fact and conclusions of law fully protect the rights of parties, a refusal to make further findings and conclusions is not error.[50]

A finding consisting only of conclusions from basic facts found in detail cannot be upheld, where it is in conflict with them.[51]

Conclusions of law, based upon findings of fact outside the issues raised by the pleadings, cannot be sustained, and will not support a judgment.[52]

a written agreement between a husband and wife implied a finding that such settlement was just. Howell v. Howell, 141 P. 412, 42 Okl. 286.

A general finding that plaintiff was entitled to land under her deed, held to include a finding that the deed had been properly delivered to her, or that its delivery had been ratified, where such facts were an essential part of her claim. Oland v. Malson, 39 Okl. 456, 135 P. 1055.

A journal entry disclosing that "the evidence being heard and the arguments of counsel and the court, being fully advised, doth find for the defendant on the issues joined," constituted a finding for defendant on the disputed facts in issue. Mason v. Harlow, 142 P. 243, 92 Kan. 1042, denying rehearing 139 P. 384, 91 Kan. 807.

A finding of the court that at the time of alleged contract, "plaintiff's mind was in an abnormal condition, superinduced by drunkenness," is sufficiently exact and certain to show that he was then mentally incapable of making a contract. Franks v. Jones, 17 P. 663, 39 Kan. 236.

Though, in an action to determine adverse claims to a tract of school land, the findings of fact do not specifically state which one of the several claimants first settled thereon, a judgment against one of them necessarily determines the fact of whether he made the first settlement against him, where it is essential to support the judgment, and is not in conflict with the findings made. Christisen v. Bartlett, 95 P. 1130, 78 Kan. 118.

[48] (Okl. 1897) El Reno Electric Light & Telephone Co. v. Jennison, 50 P. 144, 5 Okl. 759.

Findings of fact are to be construed together. Kuhn v. Johnson, 137 P. 990, 91 Kan. 188.

[49] Simpson Tp. v. Hill, 137 P. 348, 40 Okl. 233.

Where a party is not satisfied with the findings of fact made by the trial court, he should ask the trial court to make further findings or modify those made. Cowling v. Greenleaf, 6 P. 907, 33 Kan. 570.

[50] Goodman v. Malcolm, 58 P. 564, 9 Kan. App. 887.

[51] State v. Kirmeyer 128 P. 1114, 88 Kan. 589.

[52] Newby v. Myers, 24 P. 971, 44 Kan. 477.

It is not proper that the findings be confined to the issues presented in the

Where the conclusions of fact are inconsistent with the conclusions of law, the conclusions of fact control.[53]

§ 794b. Agreed statement of facts

When the parties to an action agree to admit all the facts upon which they desire to have the case submitted to the court, they have agreed upon what the facts in the case are; and when such facts are communicated to the court for the purpose of having it draw conclusions of law therefrom, and to render judgment thereon, they become an agreed statement of facts.[54]

An "agreed statement of facts" is analogous to a special verdict, and must state the ultimate facts.[55]

Where a case is presented on an agreed statement of facts, the only question that can be considered is whether they require a judgment for the plaintiff as a matter of law, and no inference of fact can be drawn.[56]

Agreements made to avoid continuances, or for other specific purposes, by their terms limited to particular occasions, possess no force beyond the occasion or after the purpose has been accomplished.[57]

A written statement of facts, purporting to be the "facts in the above-entitled cause," properly entitled, and signed by the parties to a cause, or their attorneys, and filed in the cause for use as evidence, and thereafter so used at the hearing in the probate court,

petition. If the findings are in response to the issues presented by all the pleadings taken together, they are pertinent. Boynton v. Hardin, 58 P. 1007, 9 Kan. App. 166.

Where defendant, without objection, proved a set-off under a count to which a demurrer had been sustained, after which the court treated the count as part of the pleadings, a finding by the court allowing it was within the issues. Barry v. Barry, 59 P. 685, 9 Kan. App. 884.

[53] Board of Com'rs of Wyandotte County v. Arnold, 30 P. 486, 49 Kan. 279.

[54] Noble v. Harter, 49 P. 794, 6 Kan. App. 823.

[55] Longmeyer v. Lawrence, 50 Okl. 457, 150 P. 905.

[56] Goodwin v. Kraft, 101 P. 856, 23 Okl. 329.

[57] Loman v. Paullin, 51 Okl. 294, 152 P. 73.

Where, in an action to recover possession of improvements on a town lot, the title to which is in controversy, stipulations are filed, reciting that a contest was then pending before the Secretary of the Interior, and judgment for plaintiff is reversed, and on second trial plaintiff offers the former agreed statement of facts, its exclusion was proper, where it is shown that after the entering into of the stipulations the contest over the lot had been decided. Capital Townsite Co. v. Brown, 126 P. 722, 34 Okl. 568.

is a general and solemn admission of the facts and binding upon the district court upon appeal, and conclusive in all further proceedings in the cause, unless some portions thereof are uncertain and of doubtful interpretation, in which case evidence aliunde will be received upon such points of doubtful and uncertain interpretation.[58]

A stipulation as to evidence should be so interpreted as to carry into effect the intent of the parties and the promotion of a fair trial.[59]

A stipulation by defendant that plaintiff is entitled to recover, unless an agreed state of facts constitutes a defense, waives any question of variance.[60]

Where an action is tried on an agreed statement of facts and it recites a statute of another state as a fact, counsel cannot claim that there are other facts which the court will presume to exist.[61]

The matter of permitting a party to withdraw from a stipulation concerning a pending case rests within the sound discretion of the court.[62]

Where parties stipulated what question should be submitted to the court, it was not an abuse of discretion for the court to refuse to permit one party to withdraw from the stipulation after the question had been argued.[63]

In submitting an action by agreement, on the evidence before the referee, plaintiff waived his motion for judgment on the findings of the referee, and submitted the cause on the pleadings and evidence to the court.[64]

§ 795. Submission without suit

"Parties to a question, which might be the subject of a civil action, may without action agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court, which would have jurisdiction if an ac-

[58] Blankinship v. Oklahoma City Light & Water Power Co., 43 P. 1088, 4 Okl. 242.

[59] Chicago Live Stock Commission Co. v. Fix, 78 P. 316, 15 Okl. 37; Same v. Connally, 78 P. 318, 15 Okl. 45.

[60] Brennan v. Shanks, 103 P. 705, 24 Okl. 563.

[61] Williams v. Hirschfield, 122 P. 539, 32 Okl. 598.

[62] Georgia Home Ins. Co. v. Halsey, 133 P. 202, 37 Okl. 678.

[63] Georgia Home Ins. Co. v. Halsey, 133 P. 202, 37 Okl. 678.

[64] Walker v. Walker, 88 P. 1127, 17 Okl. 467.

tion had been brought. But it must appear, by affidavit, that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The court shall thereupon hear and determine the case, and render judgment as if an action were pending." [65]

ARTICLE II

ARGUMENT AND CONDUCT OF COUNSEL

Sections

796. Opening statement.
797. Argument.
798. Right to open and close.
799. Retaliatory statements.
800. Conduct.
801. Objections and exceptions.

§ 796. Opening statement

The party who does not have the burden of proof must make his statement immediately after that of the adverse party, unless the court for special reason otherwise directs.[66]

Fullness or brevity of an opening statement is largely within discretion and control of trial court.[67]

On a motion for judgment on the averments in the petition and the opening statement of counsel, they should be liberally interpreted.[68] However, if the plaintiff's counsel, in making the opening statement of his case to the court and jury, admits or states facts the existence of which absolutely precludes a recovery by him, the court may close the trial at once, and give judgment against plaintiff.[69]

[65] Rev. Laws 1910, § 5303.

[66] Kali Inla Coal Co. v. Ghinelli, 55 Okl. 289, 155 P. 606.

[67] Caldwell v. Skinner, 101 Kan. 32, 181 P. 568.

In making a statement of the case at the trial, either party may make a statement as complete as he desires, or may omit any statement, at his discretion. Glenn v. Missouri Pac. Ry. Co., 124 P. 420, 87 Kan. 391, judgment affirmed on rehearing 128 P. 362, 88 Kan. 235.

[68] Moffatt v. Fouts, 160 P. 1137, 99 Kan. 118.

[69] Lindley v. Atchison, T. & S. F. R. Co., 28 P. 201, 47 Kan. 432; Coffeyville Mining & Gas Co. v. Carter, 70 P. 635, 65 Kan. 565; Brashear v. Rabenstein, 80 P. 950, 71 Kan. 455; Missouri Pac. Ry. Co. v. Hartman, 49 P. 109, 5 Kan. App. 581.

The statute authorizing a party on whom the burden rests to state his case

Objection to the plaintiff's opening statement, as not stating facts constituting a cause of action, should be overruled, where the lack of the fullness is supplied by the allegations of the petition.[70] or, if the petition states a cause of action, it is error on motion of the defendant, to dismiss the cause, and render judgment against the plaintiff on the opening statement of the plaintiff's counsel.[71]

Oral admission of a material fact by the attorney in his opening statement to the jury, if distinct and formal and made to dispense with the proof of some fact at the trial, is binding upon the party making it;[72] but, where the opening statement is not a solemn admission of some controverted question of fact, it is error to instruct

and the evidence by which he expects to sustain it is permissive only, and the issues are made, not by it, but by the pleading, so that, if a party does make such a statement, and there is a substantial variance between the statement and the pleadings, it is no ground on which to base a motion for judgment in favor of the opposite party unless such statement admits facts barring recovery. Stewart v. Rogers, 80 P. 58, 71 Kan. 53.

In action for damages for false representations inducing a purchase of an interest in an insolvent business, refusal to direct a verdict upon the opening statement of plaintiff's counsel held not an abuse of discretion. Abmeyer v. German-American State Bank, 103 Kan. 356, 179 P. 368.

Motion for judgment on opening statement of counsel should be denied, unless such statement solemnly admits facts made to remove such facts from controversy and which facts so admitted show that party making statement is not entitled to recover. Brady v. Ratkowsky (Okl.) 171 P. 717. Opening statement made by defendant in an action upon an account for goods sold held not sufficient upon which to predicate a judgment for plaintiff. Id.

Where the petition alleges a cause of action, and reply to answer is sufficient, a peremptory instruction for defendant on the pleadings and plaintiff's opening statement is error, unless statement contains admissions barring a recovery. King v. Lane (Okl.) 169 P. 901, L. R. A. 1918C, 351.

Where defendant by answer admits the usurious character of a note and denies no fact essential to plaintiff's recovery of the penalty provided for by Const. art. 14, § 3, except knowledge of such usurious character, and in his opening statement to the jury assumes the same attitude, a motion for a directed verdict on the opening statement is properly granted. First State Bank of Keota v. Bridges, 39 Okl. 355, 135 P. 378.

In a suit on an insurance policy, plaintiff's counsel, in stating his case to the jury, said: "The reason that we make this proof is to show you that an insurance company cannot issue a policy, take a man's money and give him something in return which is absolutely worthless the moment it is issued—not worth the paper it is written on." Held, that there was no prejudicial error. Phenix Ins. Co. of Brooklyn v. Weeks, 26 P. 410, 45 Kan. 751.

[70] Noble v. Frack, 48 P. 1004, 5 Kan. App. 786.

[71] Sullivan v. Williamson, 98 P. 1001, 21 Okl. 844.

[72] Hunt v. W. T. Rawleigh Medical Co. (Okl.) 176 P. 410.

that it contains a conclusive admission, the question being one for the jury.[73]

Where plaintiff's counsel in his opening statement recites a condition of facts which would entitle him to recover only certain damages, and such statement is a departure from the facts alleged in the petition, it is prejudicial error to overrule an objection thereto, and try the case without either having the petition amended or striking out one or the other of such causes of action.[74]

Where, in ejectment, the counsel in his opening statement spoke of the defendant's conversion of plaintiff's personalty, and the court without objection permitted evidence as to damages for such conversion, though it was not pleaded, the pleading should be construed as broad enough to include those elements of damage, or it should be considered that the issues were enlarged by consent of parties.[75]

§ 797. Argument

A party is entitled to be heard by counsel in the argument of a question of fact submitted to the jury.[76]

It is within the court's discretion to limit the time of argument;[77] and where the case is tried by the court, and it is satis-

[73] A distinct and formal oral admission of a material fact made in the opening statement to dispense with proof is conclusive on the party making same, but an alleged admission of doubtful meaning is not conclusive, especially where nullified by other statements. Patterson v. Morgan, 53 Okl. 95, 155 P. 694.

[74] Hunter Milling Co. v. Allen, 69 P. 159, 65 Kan. 158.

That plaintiff in his petition designated certain property as "merchandise," while in his opening statement to the jury he referred to it as "household goods," did not constitute such variance as to authorize the direction of a verdict for defendant. Red Ball Transfer & Storage Co. v. Deloe, 30 Okl. 522, 120 P. 575.

[75] Custer v. Royse, 104 Kan. 339, 179 P. 353.

[76] Ely Walker Dry Goods Co. v. Blake, 59 Okl. 103, 158 P. 381.

In a case tried by jury, where particular questions of fact were allowed and settled before argument, it was error for the court to refuse to allow counsel, in argument, to call the attention of the jury to each question, or to suggest or advise them what answers should be made thereto from the evidence heard. Stacy v. Cook, 61 P. 399, 62 Kan. 50.

[77] It was not an abuse of discretion to limit the argument of counsel to 15 minutes. Murphy v. Colton, 44 P. 208, 4 Okl. 181.

The action of the court in limiting the time of argument of counsel held not an abuse of discretion. Diamond v. Perry, 46 Okl. 16, 148 P. 88.

It is not an abuse of discretion, in an action tried by the court alone, where

fied as to the evidence and the law, it is not compelled to listen to any argument.[78]

No error can be predicated on the interruption of counsel for the purpose of excluding from the consideration of the jury improper testimony admitted in his client's behalf; counsel being permitted ample time thereafter to discuss the evidence properly received in the case.[79]

The opening argument should be a complete presentation of the counsel's theory of the case, and, when the opposing counsel elects not to reply, no further argument by the opening counsel should be allowed except in the discretion of the trial judge;[80] but, if the plaintiff's counsel is permitted to reargue the case, it is reversible error to refuse defendant's request to answer.[81]

only the construction of a plain, unambiguous statute is to be determined, to refuse to hear arguments of counsel. Godfrey v. Wright, 56 P. 1051, 8 Okl. 151.

[78] Barnes v. Benham, 75 P. 1130, 13 Okl. 582.

[79] Dunn v. Jaffray, 13 P. 781, 36 Kan. 408.

[80] Atchison, T. & S. F. Ry. Co. v. Lambert, 123 P. 428, 32 Okl. 665.

Where on the trial the arguments are limited to one hour on each side, and the party on whom rests the burden of the issue announces that he desires to occupy only 30 minutes, and requests the court to inform him when the time has expired, which the court does, and thereupon the attorney for the opposing party asks that the case be submitted without further argument, it is prejudicial error to permit another attorney to address the jury in behalf of the first party. St. Louis & S. F. R. Co. v. Vanzego, 80 P. 944, 71 Kan. 427.

Where the trial court informs the attorneys that each side will be given an hour and a quarter for argument, and plaintiff's attorney announces that he will consume 30 minutes only in opening, and requests the court to notify him when 30 minutes have expired, and the court acts upon his suggestion, defendant's attorney, by waiving all argument upon his part, is not guilty of misconduct, and the court does not commit error in refusing, in its discretion, further time for plaintiff's attorney to argue his case. Southern Kansas Ry. Co. v. Michaels, 30 P. 408, 49 Kan. 388.

On a trial without a jury, plaintiff's counsel waived argument and asked defendant's counsel, in the presence of the court, if they wished to argue the case. Defendant's counsel kept silent, and did not demand a right to argue, and the court then decided the case. Held that, after the decision, defendant could not content that he had not waived argument. Piatt v. Head, 10 P. 822, 35 Kan. 282.

[81] Plaintiff is not entitled to reargue the case after defendant has waived argument; and, where he is permitted to do so, it is reversible error to refuse defendant's request to answer. Board of Com'rs of Nemaha County v. Albert, 51 P. 307, 6 Kan. App. 165.

Permitting counsel to instruct the jury that it is improper to arrive at a verdict by addition and division is not reversible error, when he did not advise them how to reach a verdict. Judgment 51 P. 623, 6 Kan. App. 585, affirmed.[82]

In an action for injury by defendant's automobile, that certain slight references to a casualty company were withdrawn with an instruction to disregard them is not material error.[83]

In an action for personal injuries, a statement by the attorney for the plaintiff, that, if the jury answer a certain special question "yes," then their verdict must be for the defendant, is not ground for reversal as stating to the jury that their answers to a special question of fact must be consistent with their general verdict.[84]

In an action for personal injury from an automobile collision, it is not error for counsel in his closing argument to comment on the meaning of a statute when no objection is made thereto.[85]

In an action against a railroad company for personal injuries, a statement of plaintiff's counsel in his argument that "it matters not if this railroad company has among its stockholders counts and princes and a young girl who has been sold to a count," though improper, did not require a reversal, where the verdict was for a small amount, and counsel failed to request the court to admonish the jury not to consider same.[86]

Where the plaintiff, an employé of a railway-construction company, who was injured while at work on a tower wagon standing on the tracks of a street railway over which cars were running, brought action against both companies, and a demurrer by the railway company to the evidence was sustained, it was proper for the court to refuse to permit counsel for the construction company in an argument to the jury to comment on that part of the petition setting forth the averments against the railway company.[87]

Allowing plaintiff's attorney in his closing argument in a civil

[82] Missouri, K. & T. Ry. Co. v. Steinberger, 55 P. 1101, 60 Kan. 856.

[83] Stafford v. Noble, 105 Kan. 219, 182 P. 650.

[84] Missouri, K. & T. Ry. Co. v. Wade, 85 P. 415, 73 Kan. 359.

[85] In action for personal injury from automobile collision, closing arguments of plaintiff's counsel as to meaning of Gen. St. 1915, § 507, not then objected to, held not unreasonable or unfair. Rudy v. Headley, 103 Kan. 417, 173 P. 913.

[86] St. Louis, I. M. & S. Ry. Co. v. O'Connor, 142 P. 1111, 43 Okl. 268.

[87] North American Ry. Const. Co. v. Patry, 61 P. 871, 10 Kan. App. 55.

action to accuse defendants, husband and wife, with being persistent violators of the prohibitory law, and with having been in jail for such offenses, is ground for reversal.[88]

Where, in an action against a city for damages sustained by plaintiff falling into a ditch dug by an electric company under a franchise, there was no issue involving indemnity by the electric company to the city for any damages sustained by reason of its negligence in constructing the ditch, the admission in evidence of an ordinance containing a section by which the electric company agreed to indemnify the city against such damages was not evidence to prove the agreement of indemnity so as to justify argument of plaintiff's counsel that the city did not care whether judgment went against it or not.[89]

The scope of argument of the counsel allows a reference to evidence and deductions therefrom.[90]

§ 798. Right to open and close

The party bearing the burden of proof has the right to open and close the argument,[91] but such right my be waived by the absence

[88] Bean v. Kinseder (Kan.) 135 P. 1180.

[89] City of Shawnee v. Sparks, 110 P. 884, 26 Okl. 665, 28 L. R. A. (N. S.) 519, Ann. Cas. 1912B, 505.

[90] Spann v. State, (Okl. Cr. App.) 197 P. 531.

Where, in an action for injuries it was proved that defendant sent its physician to attend plaintiff, argument of plaintiff's counsel, in which he sought to draw deductions as to the reasons why defendant sent its physician, is not error. Enid City Ry. Co. v. Reynolds, 126 P. 193, 34 Okl. 405.

[91] Atchison, T. & S. F. Ry. Co. v. Lambert, 123 P. 428, 32 Okl. 665; Baughman v. Baughman, 4 P. 1003, 32 Kan. 538; Degan v. Tufts, 56 P. 1126, 8 Kan. App. 338; Congdon v. McAlester Carriage & Wagon Factory, 56 Okl. 201, 155 P. 597.

Where the pleadings do not disclose the exact amount plaintiff is entitled to, defendant, before being entitled to open and close the argument, should admit such amount in open court. Where defendant failed, until after opening statements were made and introduction of some evidence, to claim his right to open and close the argument, the question of granting or refusing his request rested in the court's discretion. Congdon v. McAlester Carriage & Wagon Factory, 56 Okl. 201, 155 P. 597.

Where defendant to a suit for libel or slander pleads justification, he assumes the burden of proof, and is entitled to open and close. Stith v. Fullinwieder, 19 P. 314, 40 Kan. 73.

Since, where the answer in an action on an accepted order admitted the execution and acceptance of the order, but stated that plaintiff had wrongfully obtained possession of it, the burden was on defendant to prove that

of a timely request,[92] and by waiving the opening a party waives a right to close, if the other party also waives argument.[93]

Where the party having the burden of proof makes an inadequate opening argument, and the opposing party does not reply, no further argument should be allowed, unless the court in its discretion permits the opening party to make a further argument, in which event the opposing party should be allowed to answer, and the party upon whom the burden rests should be allowed to close.[94]

When a case involves two causes of action and the burden in the first is on plaintiff and in the second on defendant, it is not important which litigant opens and closes so long as each has a fair opportunity to argue his side.[95]

§ 799. Retaliatory statements

An irrelevant statement of counsel in condemnation of defendants for violating the prohibitory laws is not ground for reversal, where it is to some extent induced by argument of opposing counsel.[96]

A new trial will not be granted because counsel for plaintiff made improper statements to the jury, where defendant's counsel also made improper statements, and both were equally at fault.[97]

the possession was wrongfully acquired, defendant had the right to open and close. Bartholomew v. Fell, 139 P. 1016, 92 Kan. 64.

In an action on note where an averment of partnership of defendants was denied under oath but admitted before trial, plaintiff was not entitled to the opening and closing. Murchison v. Nies, 123 P. 750, 87 Kan. 77.

The party upon whom rests the burden of proof may open and close the argument. Bass & Harbour Furniture & Carpet Co. v. Harbour, 140 P. 956, 42 Okl. 335. Where defendant, without objection, assumes the burden of proof in the introduction of evidence, his answer will be treated as amended to sustain his right to open and close.

[92] Congdon v. McAlester Carriage & Wagon Factory, 56 Okl. 201, 155 P. 597; Lynde-Bowman-Darby Co. v. Huff, 124 P. 1085, 33 Okl. 239.

[93] St. Louis & S. F. R. Co. v. Johnson, 86 P. 156, 74 Kan. 83.

[94] Fire Ass'n of Philadelphia v. Farmers' Gin Co., 39 Okl. 162, 134 P. 443.

[95] White v. White, 160 P. 993, 99 Kan. 133.

[96] Bean v. Kindseder, 139 P. 1024, 92 Kan. 254, reversing judgment on rehearing 135 P. 1180.

[97] Atchison, T. & S. F. R. Co. v. Dickerson, 45 P. 975, 4 Kan. App. 345.

§ 800. Conduct

That counsel for the plaintiff in a personal injury case repeatedly asked that the jury might be permitted to examine plaintiff's hip in the jury room is not ground for reversal.[98]

In negligence cases where there may be indemnity insurance, and questions to jurors as to whether they are interested in indemnity insurance companies are therefore competent, counsel cannot be charged with misconduct in asking such questions on the ground that they are asked for the purpose of prejudicing jurors.[99]

§ 801. Objections and exceptions

Statements of a case at the commencement of the trial are not pleadings, and cannot be attacked by demurrer.[1]

A mere exception to the language of counsel in his argument to the jury, which is not preceded by any ruling of the court, is insufficient to raise a question as to the propriety of the language used.[2]

It is error for the trial court to refuse and neglect to sustain an objection to prejudicial remarks of counsel and to neglect to properly admonish the jury in regard thereto.[3]

An attempt by the plaintiff's counsel to state that the defendants were indemnified against any loss, which was stopped by the court and the jury carefully instructed to disregard same is not so prejudicial as to require the discharge of the jury.[4]

[98] Missouri Pac. Ry. Co. v. Johnson, 53 P. 129, 59 Kan. 776.

[99] Swift & Co. v. Platte, 74 P. 635, 68 Kan. 1.

[1] Glenn v. Missouri Pac. Ry. Co., 124 P. 420, 87 Kan. 391, judgment affirmed on rehearing 128 P. 362, 88 Kan. 235.

[2] City of Kansas City v. McDonald, 57 P. 123, 60 Kan. 481, 45 L. R. A. 429.

[3] St. Louis & S. F. R. Co. v. Stacy, 77 Okl. 165, 171 P. 870.

[4] Russell v. Watts, 150 P. 600, 96 Kan. 275.

ARTICLE III

ISSUES AND TRIAL THEREOF

Division I.—Issues in General

Sections

802. Issues not pleaded.

Division II.—Taking Case or Question from Jury

803. In general.
804. Retrial.
805. Questions of law and fact.
806. Negligence in general.
807. Contributory negligence—Assumption of risk.
808. Agency.
809. Will contest.
810. Malicious prosecution.
811. Libel and slander.
812. Weight of evidence and credibility of witnesses.
813. Uncontroverted evidence.
814. Motions and demurrer.
815. Demurrer to evidence.
816. Effect as admission.
817. What rulings proper.
818. Cure of error.
819. Trial by court.
820. Ruling and judgment sustaining demurrer.
821. Form.
822. Direction of verdict.
823. Effect of motion.
824. Form of motion.

Division I.—Issues in General

§ 802. Issues not pleaded

"There can be no feigned issues; but a question of fact, not put in issue by the pleadings, may be tried by a jury upon an order for the trial, stating distinctly and plainly the question of fact to be tried; and such order is the only authority necessary for a trial." [5]

Division II.—Taking Case or Question from Jury

§ 803. In general

A demurrer to the evidence may be sustained, a nonsuit granted defendant, or a verdict may be directed in favor of either of the par-

[5] Rev. Laws 1910, § 4652.

ties when the testimony is insufficient to support a different verdict.[6] In other words, where there is any evidence tending to support the issues in the case, although slight, it should be submitted to the jury, and it is error to order a nonsuit or direct a verdict.[7]

[6] Holm v. Waters, 56 P. 507, 8 Kan. App. 859; Yingling v. Redwine, 69 P. 810, 12 Okl. 64; Kentucky Refining Co. v. Purcell Cotton Seed Oil Mills, 73 P. 945, 13 Okl. 220; Watkins v. Havighorst, 74 P. 318, 13 Okl. 128; Pringey v. Guss, 86 P. 292, 16 Okl. 82, 8 Ann. Cas. 412.

[7] Sullivan v. Phœnix Ins. Co., 8 P. 112, 34 Kan. 170; Benninghoff v. Cubbison, 26 P. 14, 45 Kan. 621; McMullen v. Carson, 29 P. 317, 48 Kan. 263; Snyder v. Stribling, 89 P. 222, 18 Okl. 168, judgment affirmed Same v. Rosenbaum, 30 S. Ct. 73, 215 U. S. 261, 54 L. Ed. 186.

The court should not take the case from the jury unless, as a matter of law, no recovery can be had upon any view which can properly be taken of the evidence. St. Louis & S. F. Ry. Co. v. Knowles, 51 P. 230, 6 Kan. App. 790; Union Tp. v. Hester, 54 P. 923, 8 Kan. App. 725.

Where plaintiff has made a prima facie case, it is error to take the case from the jury. Terry v. Anderson, 51 P. 800, 6 Kan. App. 921.

The court is not justified in taking a case from the jury where the state of proof is such that reasonable minds might reach different conclusions from the evidence offered. Chicago, R. I. & P. Ry. Co. v. Wood, 72 P. 215, 66 Kan. 613; Lane v. Choctaw, O. & G. R. Co., 91 P. 883, 19 Okl. 324; Duncan v. Huse, 85 P. 589, 73 Kan. 432; Avery v. Union Pac. R. Co., 85 P. 600, 73 Kan. 563; Darling v. Atchison, T. & S. F. Ry. Co., 93 P. 612, 76 Kan. 893, rehearing denied 94 P. 202, 76 Kan. 893; Crane v. Cox, 49 P. 796, 6 Kan. App. 405; Cole v. Missouri, K. & O. R. Co., 94 P. 540, 20 Okl. 227, 15 L. R. A. (N. S.) 268; St. Louis & S. F. R. Co. v. Jamieson, 95 P. 417, 20 Okl. 654; Citizens' Bank of Wakita v. Garnett, 95 P. 755, 21 Okl. 200; Missouri, K. & T. Ry. Co. v. Walker, 113 P. 907, 27 Okl. 849.

Where there is some evidence tending to support the affirmative of an issue it cannot be taken from the jury. Harter v. Atchison, T. & S. F. R. Co., 38 P. 778, 55 Kan. 250; City of Ft. Scott v. Peck, 50 P. 870, 58 Kan. 816; Loob v. Fenaughty, 55 P. 841, 60 Kan. 570; Gifford v. Griffin Ice Co., 66 P. 998, 63 Kan. 716; Burnett v. Hinshaw, 67 P. 1101, 64 Kan. 886; Electric Ry., Light & Ice Co. v. Brickell, 85 P. 297, 73 Kan. 274; Steelsmith v. Union Pac. R. Co., 40 P. 992, 1 Kan. App. 10; City of Wichita v. Coggshall, 43 P. 842, 3 Kan. App. 540; Hagan v. American Building & Loan Ass'n, 43 P. 1138, 2 Kan. App. 711; Cherokee & P. Coal & Mining Co. v. Britton, 45 P. 100, 3 Kan. App. 292; Niagara Ins. Co. v. Knapp, 47 P. 628, 5 Kan. App. 880; Skinner v. Mitchell, 48 P. 450, 5 Kan. App. 366; Atchison, T. & S. F. R. Co. v. Chenoweth, 49 P. 155, 5 Kan. App. 810; Hanlen v. Baden, 49 P. 615, 6 Kan. App. 635; St. Louis & S. F. Ry. Co. v. Toomey, 49 P. 819, 6 Kan. App. 410; McCormick Harvesting Mach. Co. v. Hayes, 53 P. 70, 7 Kan. App. 141; Weatherford v. Strawn, 55 P. 485, 8 Kan. App. 206; Douglass v. Muse, 55 P. 856, 8 Kan. App. 856; Continental Ins. Co. of New York v. Gaston, 56 P. 1129, 8 Kan. App. 857; City of Atchison v. Acheson, 57 P. 248, 9 Kan. App. 33; Gilmore v. Bank of Garnett, 63 P. 89, 10 Kan. App. 496; Suess v. Board of Com'rs of Lane County, 63 P. 451, 10 Kan. App. 583; Burnett v. Hinshaw,

But where the only issue under the evidence is one of law, the court may withdraw the case from the jury and render judgment.[8]

Where, in a civil case, it is sought to prove a fact by circumstantial evidence, and the circumstances taken separately or collectively reasonably tend to support the facts sought to be proved, it is a question for the jury to determine which of two theories the circumstances tend more reasonably to support.[9]

The court must construe unambiguous written instruments introduced in evidence, and instructions submitting to jury construction of such written instruments constitute error.[10]

63 P. 461, 10 Kan. App. 583; Belcher v. Whitlock, 56 P. 23, 6 Okl. 691; Myers v. First Presbyterian Church of Perry, 69 P. 874, 11 Okl. 544.

It is error to withdraw from a jury the consideration of a material issue of fact. Richardson v. Fellner, 60 P. 270, 9 Okl. 513; Farmers' State Bank v. Spencer, 73 P. 297, 12 Okl. 597.

It is only where a statement or admission made to a jury will as a matter of law preclude a party from recovering on his cause or defense that the court has authority to withdraw such cause or defense from the jury. Hall v. Davidson, 84 P. 556, 73 Kan. 88.

Where an issue of fact is presented in respect to whether a writing was delivered upon a condition precedent to its effectiveness, it is error to so instruct as to take such issue from the jury. Williamson v. Scully, 52 Okl. 531, 152 P. 839.

[8] Akin v. Baldwin Piano Co., 62 Okl. 239, 162 P. 221.

Where no question of fact arises in a case, and the only question to be decided is one of law alone, it is not error for the trial judge to discharge the jury, and decide the case. Brown v. Cory, 59 P. 1097, 9 Kan. App. 702.

In suit by trustee in bankruptcy to quiet title and to cancel deed to bankrupt's wife, with cross-petition claiming title, undisputed evidence showing that deed was void raised no issue for jury as to wife's right to recover property, and court properly discharged jury and rendered judgment for plaintiff, in view of Rev. Laws 1910, § 4993. Plante v. Robertson (Okl.) 175 P. 840.

Where, in replevin, limitations had been suspended pending the removal of property from the state, and since its return three years had not expired, the court did not err in refusing to submit the issue of limitations. Vaut v. Gatlin, 31 Okl. 394, 120 P. 273.

[9] Missouri, K. & T. Ry. Co. v. Simerly (Okl.) 180 P. 551.

[10] Littlefield Loan & Investment Co. v. Walkley & Chambers (Okl.) 166 P. 90.

Ordinary railroad rules as to operation of trains at crossings, etc., containing no term the meaning of which is not clear, ought to be so interpreted by the court, which must determine in every instance whether it needs any evidence in aid of interpretation. Missouri, K. & T. Ry. Co. v. Missouri Pac. Ry. Co., 103 Kan. 1, 175 P. 97.

The question whether certain written correspondence discloses a settlement between the parties at a certain time is for the court to determine, and not for the jury. Dobbs v. Campbell, 72 P. 273, 66 Kan. 805.

What is the law of another state, though a question of fact, is ordinarily determined by the court without a jury.[11]

§ 804. Retrial

"In all cases where the jury are discharged during the trial, or after the cause is submitted to them, it may be tried again immediately, or at a future time, as the court may direct." [12]

§ 805. Questions of law and fact

Where the evidence is conflicting on any issue, the determination of such issue is a question of fact, which in a jury trial should be submitted to jury, and not be decided by the court as a matter of law, by taking the case or issue from the jury, directing a verdict, or sustaining a demurrer to the evidence.[13]

[11] Hutchings, Sealy & Co. v. Missouri, K. & T. Ry. Co., 114 P. 1077, 84 Kan. 479, 41 L. R. A. (N. S.) 500, rehearing denied 121 P. 360, 86 Kan. 585.

[12] Rev. Laws 1910, § 5009.

[13] Katterhenry v. Williamson (Okl.) 190 P. 404.

Where evidence presents issue of fact, whether clear or obscure, it is duty of court to submit it to jury. Blair v. Lewis, 57 Okl. 707, 157 P. 905; State Bank of Westfield v. Kiser, 46 Okl. 180, 148 P. 685.

Whether the cause of action sued on is the same on which a former suit was based, and whether the former suit was disposed of before the second was commenced, are questions of fact properly submitted to a jury. Ball v. Biggam, 49 P. 678, 6 Kan. App. 42.

Held for the jury.—Whether plaintiff was guilty of contributory negligence, and whether defendant was negligent. Clark v. St. Louis & S. F. R. Co., 108 P. 361, 24 Okl. 764.

Which carrier's negligence was the proximate cause of plaintiff's injury. Atchison, T. & S. F. Ry. Co. v. St. Louis & S. F. Ry. Co., 41 Okl. 80, 135 P. 353, 48 L. R. A. (N. S.) 509.

Whether persons whose negligent acts caused injury were in employ or acting under direction of defendant railroad. Gulf, C. & S. F. Ry. Co. v. Beasley (Okl.) 168 P. 200.

Compress company's negligence in weighing cotton. Sapulpa Co. v. Kimball & Reading, 59 Okl. 93, 158 P. 935.

Defendant's negligence in allowing oil to overflow a question for the jury. Standard Oil Co. v. Glenn (Okl.) 176 P. 900.

The railroad's negligence in starting a train. St. Louis & S. F. R. Co. v. Cole, 49 Okl. 1, 149 P. 872, L. R. A. 1915F, 866.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), that provision of the Oklahoma Constitution (Const. art. 23, § 6) requiring submission to the jury of the defense of assumption of risk does not apply. Chicago, R. I. & P. Ry. Co. v. Jackson, 61 Okl. 146, 160 P. 736.

Whether the building material placed in a street by an abutting owner remained in the street an unreasonable time, and whether reasonable care was exercised to prevent interference with the property or business of an

adjacent owner. Culbertson v. Alexander, 87 P. 863, 17 Okl. 370, 10 Ann. Cas. 916.

In an action for the price of goods sold, whether an order was accepted on the terms proposed, and whether there was a delivery. Humphrey v. Timken Carriage Co., 75 P. 528, 12 Okl. 413.

What constitutes a reasonable time within which objection must be made to a statement of account. Lamont Mercantile Co. v. Piburn, 51 Okl. 618, 152 P. 112.

In a physician's action for services rendered in attending an injured employé of defendant at the request of defendant's agent, whether defendant was notified of plaintiff's employment. Roff Oil & Cotton Co. v. King, 46 Okl. 31, 148 P. 90.

Which parent had the care of a minor during parents' separation. Alberty v. Alberty (Okl.) 180 P. 370.

Plaintiff's right in replevin for two mules claimed under a chattel mortgage. Gerlach Bank of Woodward v. Herd, 60 Okl. 186, 159 P. 901.

The question of actual and punitive damages. Edwards v. Warnkey, 66 P. 987, 63 Kan. 889.

While malice may be inferred from the intentional use of a deadly weapon, the weight to be given it is for the jury considering the character of the instrument, the manner of its use, and attending circumstances. Eckerd v. Weve, 118 P. 870, 85 Kan. 752, 38 L. R. A. (N. S.) 516.

The question whether it was intended to waive the limitation of time within which to make claim for damages to live stock. St. Louis & S. F. R. Co. v. James, 128 P. 279, 36 Okl. 196; St. Louis & S. F. R. Co. v. Ladd, 124 Pac. 461, 33 Okl. 160.

Whether there was an implied waiver of a stipulation limiting the time to sue under a live stock transportation contract. St. Louis, I. M. & S. Ry. Co. v. Patterson (Okl.) 177 P. 898.

The reasonableness of a provision for notice to carrier of injury to a shipment of cattle. St. Louis & S. F. R. Co. v. Ladd, 124 P. 461, 33 Okl. 160.

Whether stock when received by the carrier was in bad condition. Wichita Falls & N. W. Ry. Co. v. Benton (Okl.) 167 P. 633.

The questions of what is a reasonable time for transportation of cattle and the sufficiency of the excuse for the delay. Dickinson v. Seay (Okl.) 175 P. 216.

Whether a carrier of an intrastate shipment of cattle exercised ordinary care in dipping them. Missouri, K. & T. Ry. Co. v. Williamson (Okl.) 180 P. 961.

The question of the defendant carrier's negligence in transporting cattle. St. Louis & S. F. R. Co. v. Shepard, 139 P. 833, 40 Okl. 589.

Whether property was listed with an agent, and whether the agent's services were the procuring cause of the sale. Harris v. Owenby, 58 Okl. 667, 160 Pac. 596; Chickasha Inv. Co. v. Phillips, 58 Okl. 760, 161 P. 223; Yarborough v. Richardson, 38 Okl. 11, 131 P. 680; Eichoff v. Russell, 46 Okl. 512, 149 P. 146.

The question whether brokers had acted in bad faith. Heath v. Chowning, 142 P. 1108, 43 Okl. 274.

The questions of the terms on which property was listed and the procuring cause of the sale. Schlegel v. Fuller, 48 Okl. 134, 149 P. 1118.

Terms of a sale. Culbertson v. Mann, 30 Okl. 249, 120 P. 918.

Whether a contract for the sale of realty making time of payment of the

essence was forfeited, or performance waived, and an extension of time granted. Livengood v. Ball, 63 Okl. 90, 162 P. 766.

The issue of the lessor's infancy. Giles v. Latimer, 137 P. 113, 40 Okl. 301.

Whether goods purchased were accepted. Goldstandt-Powell Hat Co. v. Cuff, 91 P. 862, 19 Okl. 243.

Whether representations constituted a fraud on the vendee. Abmeyer v. First Nat. Bank of Horton, 92 P. 1109, 76 Kan. 877.

Whether legal services were authorized by defendant. Turner v. Maxey, 45 Okl. 125, 144 P. 1064.

The questions of undue influence and testamentary capacity. Bilby v. Stewart, 55 Okl. 767, 153 P. 1173.

Whether a flood was so unusual as to amount to an act of God. Chicago, R. I. & P. Ry. Co. v. McKone, 127 P. 488, 36 Okl. 41, 42 L. R. A. (N. S.) 709.

Whether the complainant was guilty of laches was one of fact. Osincup v. Henthorn, 130 P. 652, 89 Kan. 58, 46 L. R. A. (N. S.) 174, Ann. Cas. 1914C, 1262.

Whether a new promise was made which operated to renew the claim. Higgins v. Butler, 62 P. 810, 10 Okl. 345.

Whether an officer taking an acknowledgment to a deed is financially or beneficially interested in the transaction. Hilsmeyer v. Blake, 125 P. 1129, 34 Okl. 477.

Whether the payee of a note assigned by him with guaranty of payment was entitled to relief because of the holder's negligence in forcing collection on the assignor's demand while the makers of the note were solvent. Stetler v. Boling, 52 Okl. 214, 152 P. 452.

Whether plaintiff had relinquished his parental control and turned over to another the duty of support and education. Shawnee-Tecumseh Traction Co. v. Campbell, 53 Okl. 172, 155 P. 697.

Whether consent to an operation was implied from the circumstances. Rolater v. Strain, 137 P. 96, 39 Okl. 572, 50 L. R. A. (N. S.) 880.

Whether a warehouseman used ordinary care in protecting meats placed in cold storage. Muskogee Crystal Ice Co. v. Riley Bros., 108 P. 629, 24 Okl. 114.

Whether a person who, in self-defense, shot at an assailant, and, missing him, accidentally wounded a bystander, was guilty of negligence. Shaw v. Lord, 137 P. 885, 41 Okl. 347, 50 L. R. A. (N. S.) 1069, Ann. Cas. 1916C, 1147.

Whether or not there has been a material alteration in a note after delivery. Cavitt v. Robertson, 142 P. 299, 42 Okl. 619.

Whether a fence through which a hog broke was proof against all except breachy hogs, and whether a particular hog was more than ordinarily breachy. Sharrock v. Pryor, 128 P. 243, 36 Okl. 305.

Whether plaintiff was misinformed or misled by the carrier's servants as to the regular stopping place of the train and whether he was thereby induced to believe that the train would stop at his destination. Chicago, R. I. & P. Ry. Co. v. Sheets, 54 Okl. 586, 154 P. 550.

Whether a second mortgage constituted payment or merely renewal of a first mortgage. Ford v. Coweta Hardware Co., 49 Okl. 523, 153 P. 865.

Not held for jury.—Where contract is in writing, or its terms are undisputed, though resting in parol, and where but one inference can be drawn from evidence, court must determine whether relation is that of employer and

This rule has been applied to cases wherein are presented various defenses,[14] such as fraud,[15] bad faith, forgery,[16] usury,[17] insufficient

independent contractor, or master and servant. Gulf, C. & S. F. Ry. Co. v. Beasley (Okl.) 168 P. 200.

In action for injuries against railroad and employé, where railroad, if liable at all, is liable on the principle of respondeat superior, and the court directs verdict for defendant employé, it is error to submit issue of negligence of railroad. Kansas City, M. & O. Ry. Co. v. Leuch, 60 Okl. 19, 158 P. 1146.

[14] Under evidence authorizing conflicting inferences, the question whether the parties intended that acceptance of an offer to sell goods should be made by some other means than through the mail was for the jury. Farmers' Produce Co. v. McAlester Storage & Commission Co., 48 Okl. 488, 150 P. 483, L. R. A. 1916A, 1297; Same v. Central Fruit & Produce Co., 48 Okl. 754, 150 P. 664.

In the original seller's action against a second purchaser who had assumed the original obligation held error to instruct as a matter of law that defendant was so subrogated to the original purchaser's right on a warranty in the sale. Walrus Mfg. Co. v. McMehen, 136 P. 772, 39 Okl. 667, 51 L. R. A. (N. S.) 1111.

Where, in an action to recover a publicly offered prize, plaintiff's right to recover depends upon whether the prize has been awarded under stated conditions and the testimony is conflicting, the issue is for the jury. Southwestern Land Co. v. McCallam, 136 P. 1093, 41 Okl. 657.

[15] In action on a note defended on ground of payee's fraud in obtaining it, question whether any suspicious facts and circumstances amounted to bad faith, though the holder was guilty of gross negligence, was for the jury. Mangold & Glandt Bank v. Utterback (Okl.) 174 P. 542.

In a suit on an insurance policy, evidence held insufficient to take to the jury insured's contention that a compromise agreement was not binding because the result of fraud, or not his free act. Pacific Mut. Life Ins. Co. of California v. Coley, 62 Okl. 161, 162 P. 713.

In an action on notes, evidence held sufficient to take the case to the jury on the question whether the execution of the notes was obtained by fraud. Gilpin v. Netograph Mach. Co., 108 P. 382, 25 Okl. 408, 29 L. R. A. (N. S.) 477; Edwards v. Miller, 30 Okl. 442, 120 P. 996; Jefress v. Phillips, 31 Okl. 202, 120 P. 916.

Whether a sale contract, for breach of which the action was brought, was procured by fraud without having been read by defendant, held a question for the jury. George O. Richardson Machinery Co. v. Duncan, 46 Okl. 21, 148 P. 80.

Where an injured person has been given eight days within which to decide whether he would accept an offer of settlement, and after acceptance he re-

---

[16] Where plaintiff in ejectment claims to be a purchaser in good faith and there is evidence from which bad faith may reasonably be inferred, such as a forgery in the second degree under Rev. Laws 1910, § 2646, it is error to sustain a demurrer to defendant's evidence and take the case from the jury. Baldridge v. Sunday (Okl.) 176 P. 404.

[17] See note 17 on following page.

execution of a written instrument,[18] accord and satisfaction,[19] acceptance, and waiver.[20] It has been applied to such issues as the

ceives its benefits for several months, evidence that he was told he would be stricken from the pay roll unless he signed the settlement is insufficient to justify the submission of the cause to the jury on the issue of fraud in the procurement of the compromise. Pioneer Telephone & Telegraph Co. v. Grider, 124 P. 949, 44 Okl. 206.

[17] Where interest reserved by note and mortgage is shown by their terms to be within the legal limit, question as to whether amount charged borrower was in good faith claimed as a commission or was an evasion of the law against usury was for the jury. Tuttle v. F. C. Finerty & Co. (Okl.) 171 P. 39.

Whether the fact that a note for a loan was made to surety on borrower's note and by indorsement to the lending bank constituted a bona fide sale of note at a discount to the bank, or was a device by which bank collected usurious interest, held for the jury. Bristow v. Central State Bank (Okl.) 173 P. 221.

The question of intent in usury cases is a question of fact for the jury, unless it clearly appears from the face of the instrument itself that usury has been charged. Deming Inv. Co. v. Grigsby (Okl.) 163 P. 530. Borrower's contract to pay all future taxes assessed against all interest in realty owned by him, including the interest granted to the lender by virtue of mortgage, was not conclusively an usurious contract. Id.

Whether a collateral instrument or commissions were taken and reserved with intent to charge usury, and whether the transaction was a device to evade the law against usury, held to be a question of fact, where the principal instruments were valid on their face. Garland v. Union Trust Co., 49 Okl. 654, 154 P. 676.

[18] Under conflicting evidence in a controversy between a purchaser and mortgagee, held, that the questions whether the original mortgage bore a seal, no seal being shown by the mortgage as recorded, and whether the purchaser had actual knowledge of the mortgage, were for the jury. Rollow v. Frost & Saddler, 54 Okl. 578, 154 P. 542.

[19] Where accord and satisfaction was set up as a defense held, that whether there was a meeting of minds on the new promise and whether it was intended to discharge the prior obligation necessary to such defense was a question of fact. Gentry v. Fife, 56 Okl. 1, 155 P. 246.

Whether a note of a debtor taken for a pre-existing debt extinguishes the debt is a question of fact for the jury. Ohio Cultivator Co. v. Dunkin (Okl.) 168 P. 1002.

[20] Mere occupancy and use of a building by an owner does not, as a matter of law, constitute an acceptance and waiver of nonperformance by the contractor, or ordinarily justify an inference of acceptance. Wiebener v. Peoples, 44 Okl. 32, 142 P. 1036, Ann. Cas. 1916E, 748. Mere part payment does not as a matter of law constitute an acceptance of the work of constructing a building, and a waiver of nonperformance, except, perhaps, to the extent of such payment where such acceptance and waiver is consistent with all the pertinent facts. Id.

Waiver, involving intention to abandon or relinquish a right, is a question for the jury. American Cent. Ins. Co. of St. Louis, Mo., v. Sinclair, 61 Okl. 17, 160 P. 60.

reasonableness of a contract provision for notice,[21] delivery of the contract sued on,[22] abandonment of contract[23] and of contract rights,[24] fraud and misrepresentation,[25] abandonment of a homestead,[26] good faith,[27] mutual mistake,[28] existence of facts essential to a valid marriage,[29] and to rights, duties, and liabilities as between carrier and passenger under the circumstances of particular

[21] Whether the time provided by a contract of shipment for giving notice to the railroad company of injury to the shipment is reasonable is a question of fact. St. Louis & S. F. R. Co. v. Phillips, 87 P. 470, 17 Okl. 264.

[22] Where the pleadings and evidence presented an issue of fact whether the contract sued on was delivered on a condition precedent to its effectiveness, it was error to so instruct as to take such issue from the jury. Rutherford v. Holbert, 142 P. 1099, 42 Okl. 735, L. R. A. 1915B, 221.

[23] Whether a contract is abandoned is a question of fact, to be determined from all the circumstances of the particular case. Martin v. Spaulding, 137 P. 882, 40 Okl. 191.

[24] Under conflicting evidence, held, that whether a transaction constituted a relinquishment by the buyer of his contract rights or an oral sale of the personal property, valued at $150, back to the seller, which would be void under the statute of frauds (Rev. Laws 1910, § 941), was for the jury. Elsing v. Noah, 51 Okl. 558, 152 P. 101.

[25] In action for fraud and deceit by which value of corporate stock of plaintiff was destroyed, where there was evidence of promises and representations by defendants on which he relied and which were untrue, peremptory instruction for defendants was error. Harbison v. White, 56 Okl. 566, 156 P. 335.

[26] Elliott v. Bond (Okl.) 176 P. 242.

The issue whether or not a homestead has been abandoned presents a question of fact for the jury. Carter v. Pickett, 39 Okl. 144, 134 P. 440.

Upon issue whether or not a homestead has been abandoned, the main question is that of the real intent of homestead claimant, determination of which involves a question of fact. Russell v. Koller (Okl.) 174 P. 560; McCammon v. Jenkins, 44 Okl. 612, 145 P. 1163.

[27] The good faith and genuineness of a sale, and all the circumstances which tend to exhibit the transaction in its true light, are for the jury, who must find from the evidence whether the sale was in good faith, and whether there was a sufficient change of possession as against the seller's creditors. Masters v. Teller, 56 P. 1067, 7 Okl. 668, 8 Okl. 271.

[28] Where a contracting party had weak eyes, was a poor reader, and was misled by a statement of the other party, whether he was entitled to relief for mutual mistake was for the jury. McDonald v. McKinney Nursery Co., 44 Okl. 62, 143 P. 191.

[29] Where, in an action to recover land, the issue of heirship depended upon the validity of a marriage, the existence of facts essential to a valid marriage under the Creek laws and whether a marriage was to be inferred from cohabitation and reputation were questions, for the jury. Fender v. Segro, 137 P. 103, 41 Okl. 318.

cases;[30] also as between carrier and shipper,[31] rights and liabilities

[30] Where one who had been carried on a freight train for less than full fare was informed when the train reached a station that he could be carried no further, and that he must procure a ticket, held that the question whether he was a passenger in going to the station as directed was for the jury. Chicago, R. I. & P. Ry. Co. v. Shadid, 60 Okl. 188, 159 P. 913.

In an action for injuries to a passenger, evidence held sufficient to carry the question of defendant's negligence to the jury. St. Louis & S. F. R. Co. v. Walker, 122 P. 492, 31 Okl. 494.

Where plaintiff's evidence in a passenger's action for injuries made out a prima facie case, the court properly refused to take the case from the jury, though such evidence was rebutted by that of the carrier. St. Louis & S. F. R. Co. v. Fitts, 140 P. 144, 40 Okl. 685, L. R. A. 1916C, 348.

Derailment.—Whether the evidence rebutted the presumption of the carrier's negligence, arising from the derailment of a train, held a question for the jury. Midland Valley R. Co. v. Hilliard, 46 Okl. 391, 148 P. 1001.

Infirm passenger.—Whether passenger comes within excepted class so as to impose duty on carrier to give special assistance is ordinarily for jury. St. Louis & S. F. Ry. Co. v. Dobyns, 57 Okl. 643, 157 P. 735.

Whether a passenger, by reason of sickness, age, or infirmity, comes within the class as to whom carrier owes a duty to assist in alighting from a train, is for the jury. Dickinson v. Tucker (Okl.) 176 P. 949. Carrier's duty to assist sick, aged, or infirm passengers to alight depends upon the circumstances of case; but, where there is no evidence that a passenger falls within such exception to general rule, the submission of carrier's negligence in not assisting him to alight is reversible error. Id.

In action for damages for wrongful ejection from a train, held, that whether plaintiff, by reason of infirmity, was, in exception to the general rule, entitled to personal service or attention, was for the jury. Dickinson v. Bryant (Okl.) 172 P. 432, L. R. A. 1918E, 978.

Injuries in alighting.—Evidence in a passenger's action for injuries received while alighting from a train held sufficient to warrant submitting to the jury whether plaintiff's injuries were caused by defendant's negligence. Atchison, T. & S. F. Ry. Co. v. Melson, 40 Okl. 1, 134 P. 388, Ann. Cas. 1915D, 760.

Where plaintiff, with assurance of defendant's conductor that he will have time to do so, goes into a train to assist his wife and children to a seat, and the train starts, and he attempts to get off at the vestibule at which he entered, but the door is closed and the brakeman directs him to the next vestibule door, and in getting off he is injured, it cannot be said as a matter of law that the negligence of defendant was not the proximate cause of his injury. Chicago, R. I. & P. Ry. Co. v. McAlester, 39 Okl. 153, 134 P. 661.

Whether a person who had entered a train to assist a passenger was negli-

[31] Where a carrier seeks to avoid liability on account of a snowstorm, and the evidence is conflicting as to whether the carrier, notwithstanding the storm, could have prevented the loss by ordinary care, the court should refuse a peremptory instruction for defendant. St. Louis & S. F. Ry. Co. v. Dreyfus, 141 P. 773, 42 Okl. 401, L. R. A. 1915D, 547.

as between the insurer and the insured,[32] whether a promise is orig-

gent in attempting to alight from the train while it was moving held for the jury. St. Louis & S. F. R. Co. v. Isenberg, 48 Okl. 51, 150 P. 123.

It is not contributory negligence per se for a person to alight from a moving street car, and the question of such negligence depends on the speed, the place, and other circumstances. Oklahoma Ry. Co. v. Boles, 30 Okl. 764, 120 P. 1104.

Evidence held sufficient to go to jury on question of whether defendant railroad, through its agents, had notice that deceased entered the train to seat his wife, a passenger. Chicago, R. I. & P. Ry. Co. v. Brooks (Okl.) 179 P. 924. Evidence held sufficient to go to jury on question of carrier's negligence in suddenly starting train without allowing reasonable time for deceased to procure a seat for his wife, a passenger, and leave train in safety. Id.

Place of waiting and riding.—In an action by a passenger for injuries claimed to be the result of the carrier's failure to furnish a sufficient waiting room, the question whether the injuries were from resulting exposure held for the jury. Chicago, R. I. & P. Ry. Co. v. Gilmore, 52 Okl. 296, 152 P. 1096.

Whether the place on a railway station platform, where an implied invitee was injured was a place where she would naturally and ordinarily be likely to go held a question for the jury. St. Louis & S. F. R. Co. v. Stacy, 77 Okl. 165, 171 P. 870.

That a negro passenger waiting for a train in a cold, negro waiting room declined to accept the invitation of defendant's station agent to pass through the waiting room for white persons and sit by the fire in his office, held not to render her, as a matter of law, guilty of contributory negligence, which was the proximate cause of her suffering from cold. St. Louis, I. M. & S. Ry. Co. v. Lewis, 136 P. 396, 39 Okl. 677.

In railway mail clerk's action for personal injury, evidence held sufficient to take case to jury on question of defendant's negligence in failing to furnish a car properly heated, in consequence of which clerk contracted a severe cold developing into facial paralysis. St. Louis & S. F. R. Co. v. McClain, 63 Okl. 75, 162 P. 751. In railway's mail clerk's action for personal injury, evidence held to take case to jury on the question whether defendant's negligence was proximate cause of the injury. Id.

A passenger on a box car who places himself near the open door while the train is slackening speed for his destination cannot recover for injuries received by being thrown out of the car by the stoppage of the train. Atchison, T. & S. F. R. Co. v. Johnson, 41 P. 641, 3 Okl. 41.

Under the statutes it was not negligence per se for a passenger on a mixed railroad train to occupy a seat in a baggage car. Lane v. Choctaw, O. & G. R. Co., 91 P. 883, 19 Okl. 324.

Whether a train was overcrowded or rules posted warning passengers not to ride in baggage cars are questions for the jury and not the court. Lane v. Choctaw, O. & G. R. Co., 91 P. 883, 19 Okl. 324.

[32] *Application for insurance.*—The intent of insured, and whether certain answers given to the questions in the application were false, held a question of fact. Shawnee Life Ins. Co. v. Watkins, 53 Okl. 188, 156 P. 181.

In an action on an insurance policy, where a false and fraudulent misrepresentation is alleged and the evidence is conflicting, the question is for the jury. Springfield Fire & Marine Ins. Co. v. Null, 133 P. 235, 37 Okl. 665.

The questions of the falsity of statements contained in an insurance policy

inal or collateral,[33] loss of earning capacity,[34] extent of injury,[35]

and of the applicant's intent in making them are ordinarily for the jury. Continental Casualty Co. v. Owen, 38 Okl. 107, 131 P. 1084. Under the evidence in an action on an accident insurance policy, held a question for the jury whether insured was suffering from a "defect in the body," within the meaning of that phrase in his statement indorsed on the policy. Id.

The truth of warranties in an application for insurance held for the jury under conflicting evidence. National Council, Knights and Ladies of Security, v. Owen, 47 Okl. 464, 149 P. 231.

A representation in a fire policy if false and material avoids the policy, though the question of falsity and materiality is ordinarily for the jury. Orient Ins. Co. v. Van Zandt-Bruce Drug Co., 50 Okl. 558, 151 P. 323.

In action upon life policy defended on ground that insured's statements were false, the materiality of such statements and the insured's intent to deceive are questions for the jury. American Bankers' Ins. Co. v. Hopkins (Okl.) 169 P. 489.

Whether a statement of insured, in an application for a life policy warranted to be true, is untrue is ordinarily a question for the trier of facts. National Union v. Kelley, 140 P. 1157, 42 Okl. 98.

In action on benefit certificate, truth or falsity of warranties in application is for the jury, where the evidence conflicts. National Council Knights and Ladies of Security v. Owen, 61 Okl. 256, 161 P. 178.

Proof of loss.—Whether a statement made in the proof of loss was material, false to assured's knowledge, and willfully made with intent to deceive, held for the jury. Royal Ins. Co. Limited v. Scritchfield, 51 Okl. 523, 152 P. 97.

Life insurance.—The good faith of insured, a bank cashier, in issuing a draft for his premium held a question for the jury. Mutual Life Ins. Co. v. Chattanooga Savings Bank, 47 Okl. 748, 150 P. 190, L. R. A. 1916A, 669.

Evidence in an action on a life policy, held to require submission to the

---

[33] The question whether a verbal promise to repay borrowed money is original or collateral is for the jury. Waldock v. First Nat. Bank of Idabel, 143 P. 53, 43 Okl. 348. Under the evidence, held that the question whether W.'s promise to repay money advanced to R. was an original or collateral promise was for the jury. Id.

Evidence held to present a question of fact whether a promise to pay for advancements to be made to another was primary or collateral. Richardson v. Parker, McConnel & Co., 125 P. 442, 33 Okl. 339.

[34] Proof of loss of earning capacity need not be wholly clear to go to the jury. Muskogee Electric Traction Co. v. Eaton, 49 Okl. 344, 152 P. 1109.

[35] In an injury action, where nonexpert witnesses testified that the injury was permanent, and plaintiff's injured hand was exhibited to the jury in corroboration thereof, and several expert witnesses testified that the injury was slight, and that there was a complete recovery, the extent of the injury was a question for the jury. Coalgate Co. v. Bross, 107 P. 425, 25 Okl. 244, 138 Am. St. Rep. 915.

Evidence in a passenger's action for injuries held insufficient to warrant submitting to the jury, as elements of plaintiff's damages, whether she suffered from kidney disease and paralysis as a result of her injuries; and hence instructions withdrawing these elements from the jury were improperly refused. Atchison, T. & S. F. Ry. Co. v. Melson, 40 Okl. 1, 134 P. 388, Ann. Cas. 1915D. 760.

amount of damages,[36] rights and liabilities as between employer and employé,[37] or heirs, representatives, and next of kin of the employé,[38] and the proximate cause of injury.[39]

jury of the question whether insured was in such mental condition as to be incapable of agreeing to cancellation of policy. Jones v. New York Life Ins. Co., 122 P. 702, 32 Okl. 339.

Submission of question as to whether local council had waived conditions of contract, notwithstanding court predicated its authority on wrong section of by-laws, was not error, especially where result would have been same. National Council of Knights and Ladies of Security v. Fowler (Okl.) 168 P. 914, 6 A. L. R. 591.

In an action for death benefit, where there was conflicting evidence as to issue whether insured was in good health when reinstated, case was properly submitted to the jury. Modern Brotherhood of America v. Beshara, 59 Okl. 187, 158 P. 613.

Fire insurance.—What constitutes a reasonable time within which a demand must be made to entitle the insured to appraise and inspect is ordinarily for the jury. Springfield Fire & Marine Ins. Co. v. Hays & Son, 57 Okl. 266, 156 P. 673, L. R. A. 1917A, 1078.

Evidence held sufficient to take to the jury the question whether insured complied with a "book warranty clause" of the policy. Scottish Union & National Ins. Co. v. Moore Mill & Gin Co., 143 P. 12, 43 Okl. 370.

In an action on an insurance policy, evidence held sufficient to take to the jury the question of waiver of the iron-safe clause of the policy. Gish v. Insurance Co. of North America, 87 P. 869, 16 Okl. 59, 13 L. R. A. (N. S.) 826.

Accident insurance.—In an action on an accident policy exempting the insurer from liability for injury resulting from unnecessary exposure to danger, where the facts are such that reasonable men may fairly differ upon the question as to whether insured died of injuries resulting from such cause, the question is for the jury. Pacific Mut. Life Ins. Co. v. Adams, 112 P. 1026, 27 Okl. 496.

Burglary insurance.—Evidence, in an action on a policy against burglary of a safe by the use of tools or explosives, held to authorize submitting to the jury the question whether the safe was opened by such means. Fidelity & Casualty Co. of New York v. First Bank of Fallis, 142 P. 312, 42 Okl. 662.

[36] The amount of damages recoverable in an action for wrongful death is a question for the jury. Missouri, K. & T. Ry. Co. v. West, 38 Okl. 581, 134 P. 655.

Where it is apparent that there was some loss of profits by breach of warranty of fitness of article for particular purpose, it is for the jury to determine what the loss probably was. Bishop-Babcock-Becker Co. v. Estes Drug Co., 63 Okl. 117, 163 P. 276.

[37] Where, in an employé's action for injuries, reasonable men might fairly differ as to whether defendant's negligence was shown, the court properly refused to direct a verdict for defendant. Frisco Lumber Co. v. Thomas, 142 P. 310, 42 Okl. 670.

Whether a master has been negligent is ordinarily for the jury. Interstate Compress Co. v. Arthur, 53 Okl. 212, 155 P. 861. Where the standard of the

[38-39] See notes 38 and 39 on pages 696 to 698.

master's duty is not fixed, but variable with the circumstances and incapable of being determined as a matter of law, the question whether such duty has been complied with must, if authorized by the evidence, be submitted to the jury. The question of the master's negligence becomes one of law only, where the facts are such that all reasonable men must draw the same conclusions, and then only when no recovery can be had on any view of the facts which the evidence tends to establish. Id.

In servant's action for injury, where facts are such that reasonable men may fairly differ as to defendant's primary negligence, question is for the jury. Chicago, R. I. & P. Ry. Co. v. Pruitt (Okl.) 170 P. 1143; Missouri, O. & G. Ry. Co. v. West, 50 Okl. 521, 151 P. 212.

Evidence in a railroad employé's action for injuries received in interstate commerce held to authorize the overruling of defendant's demurrer to the evidence and denial of his motion for a directed verdict. St. Louis & S. F. R. Co. v. Brown, 45 Okl. 143, 144 P. 1075.

In servant's action, question of master's negligence held for jury. Sulzberger & Sons Co. of Oklahoma v. Strickland, 60 Okl. 158, 159 P. 833.

In action by servant for personal injuries, evidence held sufficient to go to jury on question of defendant's negligence. Chicago, R. I. & P. Ry. Co. v. Mayfield, 63 Okl. 71, 162 P. 486.

In a mine employé's action for injuries from the derailment of a coal car the question whether the engineer was negligent was for the jury. Great Western Coal & Coke Co. v. Malone, 136 P. 403, 39 Okl. 693.

Under the evidence in an engineer's action for injuries to his eye from the explosion of an inadequate water glass which the fireman was attempting to put in place, held, that the question of the negligence of the master and of the fireman was for the jury. Chicago, R. I. & P. Ry. Co. v. De Vore, 143 P. 864, 43 Okl. 534, L. R. A. 1915F, 21.

In an employé's action for injuries received while fixing a coupler, defendant's negligence held for the jury. St. Louis & S. F. R. Co. v. Brown, 45 Okl. 143, 144 P. 1075.

Whether defendant's engineer was negligent under the doctrine of discovered peril, held for the jury. Chicago, R. I. & P. Ry. Co. v. Bond, 47 Okl. 161, 148 P. 103. Whether the engineer, in violation of the Federal Safety Appliance Act of March 2, 1893, as amended by acts approved April 1, 1896, and March 2, 1903 (U. S. Comp. St. §§ 8605–8615), failed to use a continuous power brake with which the train was equipped, held for the jury. Id.

In action for injuries to employé, evidence held to present a question for the jury whether defendant was guilty of negligence. Enid City Ry. Co. v. Webber, 121 P. 235, 32 Okl. 180, Ann. Cas. 1914A, 569.

Whether a master was negligent in the purchasing and furnishing of lubricating oil for use of miners in a coal mine is primarily one of fact for the jury. Hailey-Ola Coal Co. v. Parker, 122 P. 632, 32 Okl. 642, 40 L. R. A. (N. S.) 1120.

Where the negligence complained of is failure to furnish sufficient assistants to enable plaintiff to perform his work, the question is for the jury where there is any evidence that defendant failed to perform such duty, and that such failure produced the injury, and could have been reasonably anticipated. Chicago, R. I. & P. Ry. Co. v. Ashlock, 129 P. 726, 36 Okl. 706.

Whether the master is negligent in failure to see that fellow servant's previous experience qualifies him for duties to which he is assigned is for the jury. E. Van Winkle Gin & Machine Works v. Brooks, 53 Okl. 411, 156 P. 1152

Evidence held to take to jury question whether master failed to exercise reasonable care to provide plaintiff safe fellow servants. Id.

Whether an employé's injury is due to negligence of the employer in failing to furnish competent fellow servants sufficient in number, or to some other cause, is for the jury, where there is any evidence tending to support such cause of action. Sulzberger & Sons Co. v. Hoover, 46 Okl. 792, 149 P. 887.

Whether an employer has made reasonable investigation into the character, skill, and qualifications of a servant is a question of fact for the jury. Ardmore Oil & Milling Co. v. Robinson, 116 P. 191, 29 Okl. 79.

Existence and nature of relationship.—In servant's action for injury, evidence held sufficient to justify court in submitting issue of relationship to jury. Wolverine Oil Co. v. Kingsbury (Okl.) 168 P. 1021.

In an action for injuries, held that, whether the relation of master and servant existed between plaintiff and defendant was for the jury. Muskogee Electric Traction Co. v. Cox, 49 Okl. 365, 153 P. 125.

Under conflicting evidence, the question whether an injured employé is protected by the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665) or by local law may be for the jury. Chicago, R. I. & P. R. Co. v. Felder, 56 Okl. 220, 155 P. 529.

Scope and nature of employment.—In servant's action for injury, issues as to nature of his employment and extent of his duty and authority held to present questions of fact for jury. Sandals v. Mizpah Mining Co. (Okl.), 168 P. 808.

In an action for the death of a servant killed while employed by an electric company in locating "trouble" on electric wires, evidence held sufficient to to go to the jury. Fisher v. Prairie, 109 P. 514, 26 Okl. 337.

In an action by a servant for injuries from a defective electric wire pole obtained secondhand from another company by plaintiff's foreman, evidence held sufficient to go to a jury on the question whether the foreman was acting within his authority in obtaining the pole and giving it to the members of his gang. Choctaw Electric Co. v. Clark, 114 P. 730, 28 Okl. 399.

Safe place and appliances.—Under conflicting evidence, the question whether an employer has negligently failed to furnish a reasonably safe place in which to work is for the jury. Producers' Oil Co. v. Eaton, 44 Okl. 55, 143 P. 9; Chicago, R. I. & P. Ry. Co. v. Townes, 143 P. 680, 43 Okl. 568.

In action for damages proximately resulting from master's failure to properly safeguard machinery, as required by Rev. Laws 1910, § 3746, where such failure is specifically denied, the question of the master's negligence is for the jury. Maxia v. Oklahoma Portland Cement Co. (Okl.) 176 P. 907.

In an action for injuries to an employé in a mine, where the evidence tended to show that timberman, before dislodging loose rock from the roof of the mine, warned plaintiff, but did not give him sufficient time to reach a point of safety, a demurrer to the evidence held properly overruled. Creek Coal Mining Co. v. Paprotta (Okl.) 175 P. 235.

In brakeman's action for injury from master's alleged negligence in furnishing a brake wheel too small, and in having the brake set too tight, evidence held insufficient to go to the jury. Chicago, R. I. & P. Ry. Co. v. Hessenflow (Okl.) 170 P. 1161.

Where the evidence in an employé's action for injuries showed a flagrant violation of the Factory Act, the court properly refused to direct a verdict for defendant. Pioneer Hardwood Co. v. Thompson, 49 Okl. 502, 153 P. 137.

Evidence in an employé's action for injuries from negligent failure of de-

fendant to comply with the Factory Act held to authorize submitting the cause to the jury on plaintiff's theory. Planters' Cotton & Ginning Co. v. Penny, 53 Okl. 136, 155 P. 516.

In absence of rule or recognition requiring use of longer route, question whether continued use of route across elevator implied notice on part of master and consent thereto is for jury, though master would then owe duty of making passage safe by lighting. Prickett v. Sulzberger & Sons Co., 57 Okl. 567, 157 P. 356.

Whether maintenance by railway of temporary water plug or other obstruction near track, endangering operatives in their usual and necessary duties, is negligence, is for the jury. Midland Valley R. Co. v. Ogden, 60 Okl. 74, 159 P. 256.

In action by railroad employé claimed to have resulted from defective brake, evidence held sufficient to take to jury question of primary negligence of defendant. Lusk v. White, 58 Okl. 773, 161 P. 541.

Whether defendant had failed to furnish an injured servant a reasonably safe place in which to work held for the jury. Oklahoma Portland Cement Co. v. Brown, 45 Okl. 476, 146 P. 6. The character of the work held not so complex as to require the master to prescribe rules and regulations, as a matter of law. Id.

Whether a spreader was such a guard for a circular saw as is required by Rev. Laws 1910, § 3746, held for the jury. Jones v. Oklahoma Planing Mill & Mfg. Co., 47 Okl. 477, 147 P. 999.

Plaintiff, an employé of defendant railway company, was engaged under the supervision of defendant's foreman to load loose dirt into cars of defendant at the bottom of an embankment on its line of railway. The embankment was from 10 to 14 feet high, and sloped from the top outward toward the track to the bottom at an angle of about 45 degrees. On the day preceding the accident employés of the company, under the direction of the same foreman, had gone on top of the embankment, and with line bars and picks had dug six or seven holes three or four feet deep, about two and a half to three feet back from the edge of the embankment, and had cut the roots of a tree standing thereon which extended out through the top dirt of the bank, holding it in place. Plaintiff had never worked at this place before the day of the accident, and had worked there only a few hours on said day before the accident occurred. The evidence tended to show that he had no knowledge of such acts of the employés on the day previous, or of the condition of the embankment resulting therefrom, and that the same were not obvious to him upon ordinary observation, and he was not informed thereof by defendant. Plaintiff was injured by the sliding of the top dirt of the embankment down upon him and breaking his leg. Held, that the court did not err in submitting to the jury the question whether plaintiff's injury resulted from the negligence of defendant. Ft. Smith & W. R. Co. v. Ketis, 110 P. 661, 26 Okl. 696.

In an injury action by a servant evidence of the master's neglect in failing to provide a reasonably safe appliance for performance of the work required of the servant held insufficient to go to the jury. Solts v. Southwestern Cotton Oil Co., 115 P. 776, 28 Okl. 706.

38 In action for damages for death of employé from defendant's negligence, held, that demurrer to plaintiff's evidence was properly overruled, and that defendant's request for peremptory instructions was properly denied. Lusk v. Phelps (Okl.) 175 P. 756.

In action for death of oil company's servant by gas asphyxiation held, on

the evidence, that court could not say that master's culpability might not be reasonably inferred by jury, where servant had received no special warning as to particular dangers, when circumstances made such information necessary to enable him to comprehend dangers. Silurian Oil Co. v. Morrell (Okl.) 176 P. 964.

In action for the death of section foreman killed while removing his motorcar from the track, evidence held sufficient to go to the jury on the question of the primary negligence of the railroad company. Dickinson v. Granbery (Okl.) 174 P. 776.

In action for death of a brakeman, held on the evidence, that the negligence of defendant, an interstate carrier, in failing to equip freight cars with automatic couplings as required by Federal Safety Appliance Act March 2, 1893 (U. S. Comp. St. §§ 8605–8612) was for the jury. Chicago, R. I. & P. Ry. Co. v. Ray (Okl.) 168 P. 999.

In an action based on the Federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665) and violation of the Safety Appliance Act of March 2, 1893, as amended by Acts approved April 1, 1896, and March 2, 1903 (U. S. Comp. St. §§ 8605–8615) held that whether deceased was an independent contractor was for the court. Chicago, R. I. & P. Ry. Co. v. Bond, 47 Okl. 161, 148 P. 103. Under the evidence in an action based on the Federal Employers' Liability Act, held, that whether deceased was killed while engaged in interstate commerce was for the jury. Id.

In an action for the death of a miner killed by a lump of coal falling down a shaft, the question of defendant's negligence held for the jury. Osage Coal & Mining Co. v. Miozrany, 143 P. 185, 43 Okl. 453. Whether defendant was negligent in failing to furnish an appliance for the protection of a miner from coal falling down a shaft, held for the jury. Id.

Where, in an action for the death of an employé from a freight elevator accident, there was evidence reasonably tending to prove that the accident was due to negligent construction of the elevator track, and that defendant's rule, prohibiting persons riding on the elevator except at their own risk, had been abandoned, the question of the cause of the injury was for the jury. Selden-Breck Const. Co. v. Linnett, 38 Okl. 704, 134 P. 956.

Where, in an action for the death of an employé from a freight elevator accident there was evidence reasonably tending to prove that the accident was due to negligent construction of the elevator track, and that defendant's rule, prohibiting persons riding on the elevator except at their own risk, had been abandoned, the question of defendant's negligence was for the jury. Selden-Breck Const. Co. v. Linnett, 38 Okl. 704, 134 P. 956.

Where an employé is killed, the jury may infer, from proof of the manner of the occurrence and its surroundings, the cause of the accident, provided the inference is a reasonable one. St. Louis & S. F. Ry. Co. v. Clampitt, 55 Okl. 686, 154 P. 40. Under the evidence, in an action for the death of a brakeman killed by falling under a moving train, held that whether the accident was caused by a defective platform was for the jury, though there was no direct evidence that such defect caused his fall. Id.

Evidence, in action for wrongful death of mine driver in defendant's employ, held to make defendant's negligence a question for the jury. Folsom-Morris Coal Mining Co. v. Dillon (Okl.) 162 P. 696.

[39] The proximate cause of an injury is ordinarily a question for the jury. St. Louis & S. F. R. Co. v. Davis, 132 P. 337, 37 Okl. 340.

Where, in an employé's action for injuries, defendant's negligence was ad-

Where the construction of a contract is a mixed question of law and fact, it is for the jury.[40] But the court should determine the

mitted, the question of plaintiff's contributory negligence was for the jury under Const. art. 23, § 6. Revel v. Pruitt, 142 P. 1019, 42 Okl. 696.

What was the proximate cause of a servant's death is for the jury. Coalgate Co. v. Hurst, 107 P. 657, 25 Okl. 588, writ of error dismissed 32 S. Ct. 838, 225 U. S. 697, 56 L. Ed. 1262.

Whether failure of employer to comply with positive statute relating to safety of employé was proximate cause of injury is question for jury Harriss-Irby Cotton Co. v. Duncan, 57 Okl. 761, 157 P. 746.

In action by railroad employé, claimed to have resulted from defective brake, evidence held sufficient to take to jury question whether defendant's negligence was the proximate cause of the injury. Lusk v. White, 58 Okl. 773, 161 P. 541.

Evidence in an employé's action for injury held to warrant submission of the question of defendant's negligence. Missouri, O. & G. Ry. Co. v. Miller, 45 Okl. 173, 145 P. 367. Under the evidence in an action for injuries from slipping on a pile of coal and falling under a train, held, that the question of the proximate cause was for the jury. Id.

In suit for personal injuries, question whether defendant's negligence is proximate cause of injury should be left to jury where evidence is conflicting, or men of ordinary intelligence might differ as to its effect. Clinton & O. W. Ry. Co. v. Dunlap, 56 Okl. 755, 156 P. 654.

The question of whether or not defendant's negligence was the proximate cause of plaintiff's injury is for the jury, where the evidence is conflicting. St. Louis & S. F. R. Co. v. Darnell, 141 P. 785, 42 Okl. 394.

What constitutes want of ordinary care on the part of a plaintiff, and whether the same is the proximate cause of the injury, are questions for the jury. St. Louis & S. F. R. Co. v. Elsing, 132 P. 483, 37 Okl. 333.

The question of what is the proximate cause of an injury, or what is the immediate or proximate result of a given act, is ordinarily one of fact for the jury. Atchison, T. & S. F. Ry. Co. v. St. Louis & S. F. Ry. Co., 41 Okl. 80, 135 P. 353, 48 L. R. A. (N. S.) 509.

In action for personal injury in crossing accident, evidence held sufficient to carry case to jury upon question whether defendant's negligence was the proximate cause of injury. Ft. Smith & W. Ry. Co. v. Hutchinson (Okl.) 175 P. 922. In action for personal injury, the submission of question, whether injury resulted from plaintiff's act in jumping from wagon, was not error, where there was evidence from which jury might have found that she attempted to jump from wagon, though she did not jump clear but fell and had to be helped to ground. Id.

In an action for injuries to a child, from the negligent operation of a train, held, that the proximate cause of the injury was for the jury under the facts shown. St. Louis & S. F. R. Co. v. Hodge, 53 Okl. 427, 157 P. 60.

In an action for injuries to persons on the track, evidence held to raise an issue as to whether the negligence of plaintiff or of the railroad company was the proximate cause of the injury sufficient to take it to the jury. Chicago, R. I. & P. Ry. Co. v. Martin, 141 P. 276, 42 Okl. 353.

[40] Kingfisher Mill & Elevator Co. v. Westbrook (Okl.) 192 P. 209.

effect as a matter of law of undisputed facts,[41] the construction of a clear and unambiguous contract,[42] not dependent on extrinsic facts in dispute,[43] whether action for breach of contract is barred

[41] Where the facts are undisputed, it is for the court to determine as a question of law whether such facts show such actual and continued change of possession as will render a transfer of the personal property valid as against creditors of the seller. Cochran Grocery Co. v. Harris, 116 P. 185, 28 Okl. 715.

Comp. Laws 1909, § 2933, providing that every transfer of personalty is conclusively presumed, if made by a person having possession, not accompanied by immediate delivery, and followed by actual change of possession, to be void against creditors, does not apply to a mortgagee's sale, and does not render such sale void as a matter of law, though the purchaser leaves the property in possession of the mortgagor. Taylor v. Wooden, 30 Okl. 6, 118 P. 372, 36 L. R. A. (N. S.) 1018.

[42] Brown v. Coppadge, 54 Okl. 88, 153 P. 817; Waldrep v. Exchange State Bank of Keifer (Okl.) 197 P. 509.

Whether a party to an unambiguous contract is an independent contractor is a question of law to be determined by the court from an inspection of the contract in the light of surrounding circumstances. Pressley v. Incorporated Town of Sallisaw, 54 Okl. 747, 154 P. 660.

When a letter is introduced to show a promise or agreement, it is generally the court's duty to construe the terms of the letter, and not to submit it to the jury. Comanche Mercantile Co. v. Wheeler & Motter Mercantile Co., 55 Okl. 328, 155 P. 583.

Where a contract consists of letters and telegrams containing no technical words or terms of art and not dependent upon extrinsic facts for its meaning, its construction is wholly for the court. J. Rosenbaum Grain Co. v. Higgins, 136 P. 1073, 40 Okl. 181; American Jobbing Ass'n v. James, 103 P. 670, 24 Okl. 460; Brown v. Davidson, 142 P. 387, 42 Okl. 598.

Whether work sued for comes within the contract relied upon for recovery, and whether the value of the work is to be measured by the contract, are questions of law. Oklahoma County v. Blakeney, 48 P. 101, 5 Okl. 70.

Where the contract consists of several written instruments, it is the duty of the court to determine what the contract is. Bales v. Northwestern Consol. Milling Co., 96 P. 599, 21 Okl. 421.

[43] The determination of the meaning of a written contract is ordinarily a question for the court, and not one of fact for the jury, but where the construction depends upon extrinsic facts as to which there is a dispute, its construction is a mixed question of law and fact, and is for the jury under proper instructions from the court. Rider v. Morgan, 31 Okl. 98, 119 P. 958.

Where a contract of employment is in writing, the question of the relation between the parties is ordinarily for the court, but if oral and the evidence is conflicting, or where the written contract has been modified by the practice under it, the question is for the jury. Chicago, R. I. & P. Ry. Co. v. Bennett, 128 P. 705, 36 Okl. 358. Where a contract of employment is oral, and there is no dispute as to its terms, or only one inference can be drawn, the question of the relation created is for the court. Id.

by limitations,[44] whether correspondence constitutes a contract,[45] whether a contract is against public policy,[46] and the validity of a deed, where the pertinent facts are not in dispute.[47]

§ 806. —— Negligence in general

Negligence is always a question for the jury when reasonable men may differ as to the facts or inferences to be drawn.[48]

It is only where the facts are such that all reasonable men must

[44] Froage v. Webb (Okl.) 165 P. 150.

[45] Where a transaction consists entirely of letters and telegrams, the question whether such correspondence constitutes a contract is for the court. J. Rosenbaum Grain Co. v. Higgins, 136 P. 1073, 40 Okl. 181; American Jobbing Ass'n v. James, 103 P. 670, 24 Okl. 460; Atwood v. Rose, 122 P. 929, 32 Okl. 355.

[46] Whether a contract is against public policy is for the court. Huber v. Culp, 46 Okl. 570, 149 P. 216. Evidence in an action on a contract, made by defendant in an alienation suit, to reimburse the wife for the amount she might lose by a settlement with her husband, held to show the contract with sufficient definiteness to require submission of the case to the jury. Id.

[47] Where cancellation of a deed is sought because not joined in by the husband, execution and acknowledgment thereof by the wife being admitted, its validity is for the court. Wesley v. Diamond, 44 Okl. 484, 144 P. 1041.

[48] Chicago, R. I. & P. Ry. Co. v. Schands, 57 Okl. 688, 157 P. 349; Chicago, R. I. & P. R. Co. v. Felder, 56 Okl. 220, 155 P. 529; Chicago, R. I. & P. Ry. Co. v. Rogers, 60 Okl. 249, 159 P. 1132; Rock Island Coal Mining Co. v. Davis, 44 Okl. 412, 144 P. 600; St. Louis & S. F. R. Co. v. Williams, 122 P. 152, 31 Okl. 450; Muskogee Vitrified Brick Co. v. Napier, 126 P. 792, 34 Okl. 618; Mean v. Callison, 116 P. 195, 28 Okl. 737; Neeley v. Southwestern Cotton Seed Oil Co., 75 P. 537, 13 Okl. 356, 64 L. R. A. 145; Oklahoma Gas & Electric Co. v. Lukert, 84 P. 1076, 16 Okl. 397; Choctaw, O. & W. Ry. Co. v. Wilker, 84 P. 1086, 16 Okl. 384, 3 L. R. A. (N. S.) 595; Home Oil & Gas Co. v. Dabney, 79 Kan. 820, 102 P. 488; St. Louis & S. F. R. Co. v. Copeland, 102 P. 104, 23 Okl. 837; Patterson v. Missouri, K. & T. Ry. Co., 104 P. 31, 24 Okl. 747.

St. Louis, I. M. & S. Ry. Co. v. Weldon, 39 Okl. 369, 135 P. 8.

In action for injuries to a child from the exhaust pipe of a stationary engine extending out of a building, whether the premises constituted an attractive nuisance and defendant was guilty of negligence in respect thereto, held for the jury. Chicago, R. I. & P. Ry. Co. v. Wright, 62 Okl. 134, 161 P. 1070.

In an action for injuries from falling into an excavation on a lot adjoining premises occupied by plaintiff, due to the giving way of a path which ran near the edge of the excavation, the question whether defendants were negligent in failing to wall up such excavation held for the jury. Connally v. Woods, 39 Okl. 186, 134 P. 869. Where an occupant of premises adjoining a lot upon which an excavation has recently been made is injured from falling into the excavation while following a path near its edge, which path gives way for want of lateral support, and it appears that she had been ac-

draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court.[49] However,

customed to use this path for several months, she is not guilty of contributory negligence, as a matter of law. Id.

Issues as to negligence and contributory negligence and the proximate cause of an injury are for the jury, where the evidence is conflicting, and where different minds might reasonably draw different conclusions. St. Louis & S. F. R. Co. v. Copeland, 102 P. 104, 23 Okl. 837; Harris v. Missouri, K. & T. Ry. Co., 103 P. 758, 24 Okl. 341, 24 L. R. A. (N. S.) 858.

Streets and parking places.—In action against a city for damages for falling into open catch-basin on public street, evidence held sufficient, as against a demurrer to the evidence, to charge city with notice of open condition of catch-basin. City of Ada v. Smith (Okl.) 175 P. 924.

In action against city for personal injury to servant of abutting owner impliedly authorized to enter parking space to mow grass thereon, held, on the evidence, that city's negligence in not keeping space in a condition reasonably safe for use was for jury. City of Shawnee v. Drake (Okl.) 171 P. 727, L. R. A. 1918D, 810.

Railroad and crossing accidents.—In an action for injury at a railroad crossing, held, on the evidence, that court did not err in submitting the question of negligence to the jury. Ft. Smith & W. R. Co. v. Moore (Okl.) 169 P. 904.

Evidence held to present question for jury whether there was excessive speed of train by which plaintiff crossing the track was injured. Chicago, R. I. & P. Ry. Co. v. Barton, 59 Okl. 109, 159 P. 250.

Under the evidence in an action against a railroad company, for injuries from failure to restore a highway to proper condition, held, that whether the highway had been restored, as required by Comp. Laws 1909, §§ 1360, 7498, was for the jury. St. Louis & S. F. R. Co. v. Bell, 58 Okl. 84, 159 P. 336, L. R. A. 1917A, 543.

Evidence, in an action for damages from collision between a train and plaintiff's wagon at a crossing, held sufficient to take the case to the jury on the question of negligence and contributory negligence. St. Louis & S. F. R. Co. v. Clark, 142 P. 396, 42 Okl. 638.

Under the evidence, in an action for injuries from being thrown from a buggy on a dark night into an open unguarded sewer at an unlighted railroad crossing, held, that the question of the defendant railway company's negligence was for the jury. St. Louis, I. M. & S. Ry. Co. v. O'Connor, 142 P. 1111, 43 Okl. 268.

Whether defendant's violation of an ordinance requiring safety gates and competent persons to operate same caused plaintiff's injury was for the jury. St. Louis & S. F. R. Co. v. Hart, 45 Okl. 659, 146 P. 436.

In an action for injuries at a crossing, evidence held sufficient to take to the jury the question of proximate cause. St. Louis & S. F. Ry. Co. v. Kral, 122 P. 177, 31 Okl. 624.

Where, in an action for death at a crossing, the evidence is conflicting as to whether the engineer used ordinary care to prevent injuring the man, the

[49] St. Louis-San Francisco Ry. Co. v. Teel (Okl.) 198 P. 78; Prickett v. Sulzberger & Sons Co., 57 Okl. 567, 157 P. 356.

negligence is so much a mixed question of law and fact that courts are seldom justified in saying that all reasonable men will agree

question was for the jury. Atchison, T. & S. F. Ry. Co. v. Baker, 130 P. 577, 37 Okl. 48.

Where a footpath across and along a railroad track has been habitually used by the public for many years, it is a question of fact whether the railroad company has not acquiesced in such use. Wilhelm v. Missouri, O. & G. Ry. Co., 52 Okl. 317, 152 P. 1088, L. R. A. 1916C, 1029.

In action for the death of a telegraph company's employé struck by defendant's train, evidence as to whether engineer and fireman saw deceased in a place of peril in time to have avoided the injury by the exercise of ordinary care held to make a question for the jury. Lusk v. Haley, 75 Okl. 206, 181 P. 727.

Whether certain place constitutes part of station grounds, or public highway, where railway company is by statute exempt from maintaining fence, is a question of fact for the jury. Missouri, K. & T. Ry. Co. v. Bandy, 75 Okl. 57, 181 P. 313.

In an action against a railroad company for injuries to cattle, because of unfenced station grounds, the question of the necessity of such grounds is for the jury. Dickinson v. Stewart (Okl.) 174 P. 233. In an action against a railroad company for injuries to cattle, because of unfenced station grounds, where there is no evidence controverting the necessity of such grounds, the court must instruct for defendant. Id.

Where in a stock-killing case, plaintiff's right of recovery depended on negligence, and there was no evidence of negligence or circumstances from which negligence might reasonably be inferred, the court should have directed a verdict for defendant. Ft. Smith & W. R. Co. v. Dixon, 51 Okl. 722, 152 P. 350.

Where uncontroverted evidence of engineer and fireman shows that they did all they could have done on discovering cow on track to prevent injury, verdict should be directed for railroad. Missouri, K. & T. Ry. Co. v. Raines, 59 Okl. 52, 158 P. 936.

Whether a railroad company is liable for injuries caused to stock in a field, frightened by steam, is for the jury where reasonable men might differ as to the conclusions to be drawn from the circumstances. Chicago, R. I. & P. R. Co. v. Hine, 59 Okl. 143, 158 P. 597.

Question whether the place of accident was such as Rev. Laws 1910, § 1435 (Comp. Laws 1909, § 1389), required to be fenced or was a part of the station grounds or she is unable to consent. People v. MacDonald, 140 P. 256, 167 Cal. 545.

Where, in an action for the killing of a hog struck by a train, the uncontradicted evidence showed that the railroad company had used ordinary care to prevent the injury, it was error to refuse a peremptory instruction for defendant. St. Louis & S. F. R. Co. v. Higgs, 141 P. 10, 42 Okl. 171.

Where, in a stock-killing case, there is no evidence of negligence or circumstances from which negligence may be reasonably inferred, a verdict should be directed for defendant. Missouri, K. & T. Ry. Co. v. Box, 48 Okl. 402, 150 P. 111.

Where the testimony of the engineer and fireman is positive that the alarm was sounded, emergency brakes applied as soon as stock was discovered

with them on question whether given facts constitute ordinary care.[50] Where standard and measure of duty is defined by law, and is same under all circumstances, its omission is negligence, and may be so declared by court.[51] Where the standard of duty to use care is not fixed, and shifts with circumstances, it is not determinable as matter of law, and must be submitted to jury.[52]

The jury has no exclusive province, unless there is an issue as to the existence of such an act of omission or commission as in law would constitute negligence.[53]

It has been held a question for the jury whether a city had sufficient notice of defects in its public ways.[54]

on the track, and everything possible done, and there is no testimony to show negligence, the court should direct a verdict for defendant. St. Louis & S. F. R. Co. v. Webb, 128 P. 252, 36 Okl. 235.

Where, in an action for killing plaintiff's horse, there was no evidence from which negligence on defendant's part could be inferred, the court should have directed verdict for defendant. St. Louis & S. F. R. Co. v. McClelland, 128 P. 1081, 36 Okl. 573.

In an action by a widow for killing of her husband by defendant's train, evidence held not to warrant submission of the last clear chance rule. Missouri, O. & G. Ry. Co. v. Lee (Okl.) 175 P. 367.

Fires.—It was a question of fact whether the company was negligent in permitting inflammable material to accumulate on the right of way. Missouri, O. & G. Ry. Co. v. Gentry, 122 P. 537, 31 Okl. 579. Allowing combustible material to accumulate on right of way is not negligence per se, and the railway company is not negligent unless such accumulations were such as would not have been permitted by an ordinarily prudent man on his own premises. Id.

Where it appeared that a fire was started on the right of way by a locomotive, held the province of the jury to determine whether the presumption of negligence was overcome. St. Louis, I. M. & S. Ry. Co. v. Marlin, 128 P. 108, 33 Okl. 510.

[50] Prickett v. Sulzberger & Sons Co., 57 Okl. 567, 157 P. 356.

[51] Id.

[52] Id; Littlejohn v. Midland Valley R. Co., 47 Okl. 204, 148 P. 120.

[53] Smith v. Acme Milling Co., 126 P. 190, 34 Okl. 439.

It is only when the facts are such that all reasonable men must draw the same conclusions that the question of negligence, other than failure to perform a statutory duty, becomes a question of law for the court. Farrier v. Colorado Springs Rapid Transit Ry. Co., 95 P. 294, 42 Colo. 331, 126 Am. St. Rep. 158; Missouri, K. & T. Ry. Co. v. Shepherd, 95 P. 243, 20 Okl. 626; Metropolitan Ry. Co. v. Fonville, 91 P. 902, 19 Okl. 283; Sans Bois Coal

[54] Bellevue Gas & Oil Co. v. Carr (Okl.) 161 P. 203; City of Lawton v. Hills, 53 Okl. 243, 156 P. 297; Cleveland Trinidad Paving Co. v. Mitchell, 140 P. 416, 42 Okl. 49; City of Woodward v. Bowder, 46 Okl. 505, 149 P. 138.

§ 807. —— Contributory negligence—Assumption of risk

"The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury." [55]

This provision is not merely declaratory of the common law, but requires that these defenses be left to the jury in all cases.[56] It has been frequently applied in actions for injuries to employés,[57] and other persons; [58] as has the general rule requiring submission

Co. v. Janeway, 99 P. 153, 22 Okl. 425; Independent Cotton Oil Co. v. Beacham, 31 Okl. 384, 120 P. 969.

Where from the evidence, though undisputed, reasonable men might draw different conclusions as to negligence or contributory negligence, such questions are for the jury. Sans Bois Coal Co. v. Janeway, 99 P. 153, 22 Okl. 425.

[55] Const. Okl. art. 23, § 6; Wichita Falls & N. W. Ry. Co. v. Groves (Okl.) 196 P. 677; Hailey-Ola Coal Co. v. Morgan, 39 Okl. 71, 134 P. 29; City of Ada v. Smith (Okl.) 175 P. 924.

In view of this provision, the jury's finding is conclusive upon the court. Dickinson v. Cole (Okl.) 177 P. 570.

[56] Dickinson v. Cole (Okl.) 177 P. 570; Dickinson v. Whitaker, 75 Okl. 243, 182 P. 901; Lusk v. Phelps (Okl.) 175 P. 756; St. Louis & S. F. R. Co. v. Long, 137 P. 1156, 41 Okl. 177, Ann. Cas. 1915C, 432; St. Louis & S. F. R. Co. v. Hart, 45 Okl. 659, 146 P. 436; Oklahoma Ry. Co. v. Milam, 45 Okl. 742, 147 P. 314; Chicago, R. I. & P. Ry. Co. v. Hill, 129 P. 13, 36 Okl. 540, 43 L. R. A. (N. S.) 622; Thorp v. St. Louis & S. F. R. Co. (Okl.) 175 P. 240; St. Louis & S. F. R. Co. v. Boush (Okl.) 174 P. 1036.

The court should not instruct that certain circumstances or facts do or do not constitute contributory negligence. Wichita Falls & N. W. Ry. Co. v. Woodman, 64 Okl. 326, 168 P. 209.

[57] Oklahoma Coal Co. v. Corrigan (Okl.) 168 P. 1024; Chicago, R. I. & P. Ry. Co. v. Warren, 63 Okl. 190, 163 P. 705; St. Louis & S. F. R. Co. v. Long, 137 P. 1156, 41 Okl. 177, Ann. Cas. 1915C, 432; Osage Coal & Mining Co. v. Sperra, 142 P. 1040, 42 Okl. 726; Sulsberger & Sons Co. v. Castleberry, 139 P. 837, 40 Okl. 613; Frisco Lumber Co. v. Thomas, 142 P. 310, 42 Okl. 670; Dewey Portland Cement Co. v. Blunt, 38 Okl. 182, 132 P. 659; Chicago, R. I. & P. R. Co. v. Duran, 38 Okl. 719, 134 P. 876; Petroleum Iron Works Co. v. Wantland, 114 P. 717, 28 Okl. 481; Chicago, R. I. & P. R. Co. v. Felder, 56 Okl. 220, 155 P. 529; Dickinson v. Whitaker, 75 Okl. 243, 182 P. 901; Midland Valley R. Co. v. Cox (Okl.) 170 P. 485; Sandals v. Mizpah Mining Co. (Okl.) 168 P. 808.

[58] In action for injuries from falling into excavation in a street, held, that a refusal to instruct on contributory negligence of which there was evidence was error, under Const. art. 23, § 6. City of Poteau v. Delaney, 48 Okl. 361, 150 P. 208.

Whether the negligence of the chauffeur was to be imputed to deceased, who was riding with him on invitation of the owner of the car, held a question of law for the court and not one of contributory negligence for the jury,

to the jury of all controverted questions of fact, including contributory negligence and assumption of risk.[59] In a few instances it

under Const. art. 23, § 6. St. Louis & S. F. R. Co. v. Bell, 58 Okl. 84, 159 P. 336, L. R. A. 1917A, 543.

Under Const. art. 23, § 6 (Williams Ann. Const. § 355), providing that the defense of contributory negligence shall always be left to the jury, it is error to take the case from the jury, where there is any competent testimony which, when considered in the light most favorable to plaintiff, reasonably tends to show a primary negligence. Anthony v. Bliss, 39 Okl. 237, 134 P. 1122.

Where, in an action for personal injuries at a crossing, the evidence was conflicting as to whether plaintiff looked and listened before crossing the track, the question of contributory negligence was for the jury under Williams' Ann. Const. art. 23, § 6. Midland Valley R. Co. v. Shores, 136 P. 157, 40 Okl. 75, 49 L. R. A. (N. S.) 814.

As contributory negligence is, under Const. art. 23, § 6, a question of fact, court, in motorman's action for injury from collision with defendant's engine, properly left that question to jury under proper instructions. St. Louis & S. F. Ry. Co. v. McFall, 63 Okl. 124, 163 P. 269.

[59] *Personal injuries.*—A person who receives an injury on account of a defective sidewalk is not necessarily precluded from recovering damages therefor merely because of his previous knowledge of the defect, but such knowledge is an element for the jury to consider in determining the question of ordinary care. City of Ottawa v. Black, 61 P. 985, 10 Kan. App. 439; Pitman v. City of El Reno, 37 P. 851, 2 Okl. 414, judgment reversed Pittman v. Same, 46 P. 495, 4 Okl. 638.

It is not contributory negligence per se to use a sidewalk with knowledge of its defective condition. City of Highlands v. Raine, 47 P. 283, 23 Colo. 295; City of Guthrie v. Finch, 75 P. 288, 13 Okl. 496.

The question as to whether or not the whole width of a street of a city must be kept in a safe condition for travel is a question of fact for the jury. City of Guthrie v. Swan, 41 P. 84, 3 Okl. 116. Where, in an action for a fall received in passing over a partially graded street at night, on which there were no barriers, the evidence was conflicting as to the condition of the street, and as to whether it was lighted, and plaintiff claimed not to know the condition of the street, the question of contributory negligence is for the jury. Id.

Where a traveler on horseback, passing along a street, saw a light, which he presumed to be a danger signal, some 40 feet from him, and, failing to slacken speed to investigate, fell into an excavation which extended beyond the signal, the question of his contributory negligence was for the jury. City of Oklahoma City v. Welsh, 41 P. 598, 3 Okl. 288.

Whether one injured while walking on a sidewalk at night, with knowledge that it is defective, and looking for the defect at the time, is guilty of contributory negligence, is a question for the jury. Pitman v. City of El Reno, 37 P. 851, 2 Okl. 414, judgment reversed Pittman v. City of El Reno, 46 P. 495, 4 Okl. 638.

Where, in an action against a city for injuries resulting from a defective sidewalk, defendant demurred to the evidence, which showed contributory negligence, it was the duty of the court under Code 1890 to say whether or

has been applied in actions for damages to property.[60] It does not apply, however, where there is no evidence of negligence by the defendant.[61]

not plaintiff was guilty of contributory negligence as a matter of law. Pittman v. City of El Reno, 46 P. 495, 4 Okl. 638.

The plaintiff tripped in the darkness over a piece of wire stretched across the sidewalk, in connection with a building in process of construction. The usual city electric light near that point was not burning, and there was no danger signal. The plaintiff's testimony was that she was passing quietly and carefully along; that she passed the point several times a day, but had not seen the sidewalk in that condition before, nor knew that the sidewalk had been taken up; and that, as well as she could see, there was plenty of room to walk. Held, that the question of her negligence was for the jury. City of Guthrie v. Thistle, 49 P. 1003, 5 Okl. 517.

The sufficiency of a highway is usually a mere question of fact to be determined by the jury under the evidence concerning its actual condition. City of Guthrie v. Swan, 51 P. 562, 5 Okl. 779. Plaintiff was injured while passing by a point of danger upon one of defendant's streets. She was not acquainted with the danger. The night was particularly dark. She was walking slowly and carefully. There were no lights—either danger signals or the usual electric light—near the point. No barriers to protect travelers from the place of danger were erected. When she discovered an obstruction,

---

[60] In an action against a railroad company for failure to ship certain seed, the question of contributory negligence in exposing the seed to rains, and permitting it to remain so exposed for a period during which rains would likely fall upon it, whereby it would heat and spoil, thereby contributing to the injury, is for the jury. Chicago, R. I. & P. R. Co. v. Beatty, 116 P. 171, 27 Okl. 844.

Where, in an action for damages to an automobile at a crossing, there was evidence tending to prove that defendant's negligence proximately caused the injury, it was not error, under Const. art. 23, § 6 (Williams' Ann. Const. § 355), to overrule defendant's demurrer to the evidence and motion to instruct a verdict, regardless of any evidence of plaintiff's contributory negligence. St. Louis & S. F. R. Co. v. Model Laundry, 141 P. 970, 42 Okl. 501. Evidence in an action for damages to an automobile at a crossing held sufficient to take to the jury the question whether defendant was guilty of negligence proximately causing the injury. Id. Under the evidence in an action for damages to an automobile at a crossing, held not error to submit to the jury the question whether plaintiff might recover, regardless of his contributory negligence by reason of defendants having been guilty of willful and wanton negligence proximately causing the injury. In an action for damages to an automobile at a crossing, a mere inference of discovery of peril in time for defendant to have avoided the collision by ordinary care, predicated alone on certain circumstances and contradicted by the engineer's positive testimony, held too improbable to warrant submitting to the jury the question of discovered peril.

[61] Barnsdall Oil Co. v. Ohler, 48 Okl. 651, 150 P. 98; Phœnix Printing Co. v. Durham, 122 P. 708, 32 Okl. 575, 38 L. R. A. (N. S.) 1191; Chicago, R. I. & P. Ry. Co. v. Barton, 59 Okl. 109, 159 P. 250.

On the issue of an employé's assumption of risk in an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), where the evidence is such that all reasonable men must

she stepped down from the sidewalk, and out into the road, where she thought it was smooth. She thought it was only down about a foot, but it proved to be two or three feet, and, in doing so, she was injured. Held, that the question of contributory negligence was for the jury. Id.

The sufficiency of notice to fasten liability upon a city for a defective sidewalk is a question of fact to be determined by the jury under all the circumstances surrounding the particular case. Town of Norman v. Teel, 69 P. 791, 12 Okl. 69. Whether a person injured by a defective sidewalk was in the exercise of ordinary care at the time of the injury is a question of fact for the jury. Id.

Negligence is generally for jury, and when competent evidence thereof has been admitted, it is only where standard of duty may be determined as matter of law, or where on undisputed facts reasonable men could not draw different conclusions, that courts may take question from jury. City of Cushing v. Stanley (Okl.) 172 P. 628.

The determination as to what constitutes ordinary care, reasonable prudence, and the like is for the jury, unless the facts are such that all reasonable men must draw the same conclusion. Dickinson v. Granbery (Okl.) 174 P. 776.

Negligence is ordinarily a question of fact for the jury, and where the standard of duty is not fixed, but shifts with the circumstances of the case, and where the evidence is sufficient, whether duty has been complied with is for the jury. Ponca City Ice Co. v. Robertson (Okl.) 169 P. 1111.

Where issue of contributory negligence is raised by pleadings, and there is any evidence to support defense, question is for jury. Enid Mill & Elevator Co. v. Kester, 59 Okl. 13, 157 P. 355.

The fact that plaintiff complained to defendant of the defect in a tank placed by defendant in plaintiff's kitchen held not to establish contributory negligence as matter of law precluding recovery for injuries received by the falling of the tank. Moore v. Johnson, 136 P. 422, 39 Okl. 587.

Whether the plaintiff in a personal injury case has exercised ordinary care to avoid injury is for the jury. Cleveland Trinidad Paving Co. v. Mitchell, 140 P. 416, 42 Okl. 49.

In an action for injuries, the questions of negligence and contributory negligence are primarily for the jury, and only become questions of law when there is no dispute in the evidence and but one inference can be reasonably drawn therefrom. Kimic v. San Jose-Los Gatos Interurban Ry. Co., 104 P. 986, 156 Cal. 379; Rudd v. Byrnes, 105 P. 957, 156 Cal. 636, 26 L. R. A. (N. S.) 134, 20 Ann. Cas. 124; St. Louis & S. F. R. Co. v. Loftis, 106 P. 824, 25 Okl. 496.

Where the evidence is conflicting, or where the facts are undisputed, and different minds might reasonably draw different conclusions from them, the question of negligence is for the jury, and hence it was not negligence per se for a person approaching a railroad crossing, who had once looked and listened at a distance of about 50 feet from the track, and seeing no train approaching within the distance of 500 or 600 feet, for which distance the

reach the same conclusion, the question is one of law; but, where the facts are controverted, or where different inferences may be drawn therefrom, the question is for the jury.[62]

view was unobstructed, to attempt to cross without again looking and listening. Clark v. St. Louis & S. F. R. Co., 108 P. 361, 24 Okl. 764.

Failure of a person, driving a wagon which was struck by a street car at a street intersection, to look and listen held not contributory negligence per se. Chickasha St. Ry. Co. v. Marshall, 141 P. 1172, 43 Okl. 192. Under conflicting evidence, in an action for injuries from collision between a street car and a wagon, held, that the questions of defendant's negligence and plaintiff's contributory negligence were for the jury. Id.

Injuries to employés.—Where it is contended that injured servant was guilty of negligence, that question is for jury under proper instructions. Sulzberger & Sons Co. of Oklahoma v. Strickland, 60 Okl. 158, 159 P. 833; Chicago, R. I. & P. Ry. Co. v. Lillard, 62 Okl. 63, 161 P. 779; Dickinson v. Granbery (Okl.) 174 P. 776; Oklahoma Coal Co. v. Corrigan (Okl.) 168 P. 1024; San Bois Coal Co. v. Resetz, 143 P. 46, 43 Okl. 384; Missouri, O. & G. Ry. Co. v. Miller, 45 Okl. 173, 145 P. 367; Choctaw Cotton Oil Co. v. Pope, 47 Okl. 383, 148 P. 170; Enid City Ry. Co. v. Webber, 121 P. 235, 32 Okl. 180, Ann. Cas. 1914A, 569; Chicago, R. I. & P. Ry. Co. v. Hill, 129 P. 13, 36 Okl. 540, 43 L. R. A. (N. S.) 622; Chicago, R. I. & P. Ry. Co. v. Wright, 39 Okl. 84, 134 P. 427.

It is not negligence per se for foreman of section crew to risk his life in attempting to protect the crew and passengers of an approaching train from danger. Dickinson v. Granbery (Okl.) 174 P. 776.

Assumption of risk held for the jury. St. Louis & S. F. R. Co. v. Brown, 45 Okl. 143, 144 P. 1075; Choctaw Cotton Oil Co. v. Pope, 47 Okl. 383, 148 P. 170; Chicago, R. I. & P. Ry. Co. v. Lillard, 62 Okl. 63, 161 P. 779; Chicago, R. I. & P. Ry. Co. v. Rogers, 60 Okl. 249, 159 P. 1132; Sandals v. Mizpah Mining Co. (Okl.) 168 P. 808.

In action for the death of a railroad employé killed by the overturning of a locomotive, evidence held to justify the submission of assumption of risk to the jury. Kansas City, M. & O. Ry. Co. v. Roe (Okl.) 180 P. 371.

In determining assumption of risk, whether an employé was inexperienced or ignorant of the dangers incident to his employment, whether he was acting under his master's orders, and whether the danger was so apparent that he should have refused to obey the orders, are questions for the jury. Enid Electric & Gas Co. v. Decker, 128 P. 708, 36 Okl. 367.

The question whether a servant saw and appreciated the danger caused by his master's negligence held for the jury. Missouri, K. & T. Ry. Co. v. Hudson (Okl.) 175 P. 743, 9 A. L. R. 223.

An employé not engaged in making a reasonably safe place dangerous, or an obviously dangerous place safe, was not, as a matter of law, when injured by its condition injured by a risk incident to his employment. Chicago, R. I. & P. Ry. Co. v. Townes, 143 P. 680, 43 Okl. 568.

[62] Kansas City, M. & O. Ry. Co. v. Roe (Okl.) 180 P. 371.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), where all the evidence, including that of plaintiff, showed a

Whether an injured party has exercised ordinary care to prevent or lessen his damage is a question of fact.[63]

§ 808. —— Agency

Under conflicting evidence on the question of agency, such question is for the jury,[64] as is also the extent of the agent's authority.[65]

clear case of assumption of risk, it is improper to deny motion for directed verdict. Chicago, R. I. & P. Ry. Co. v. Jackson, 61 Okl. 146, 160 P. 736.

In an action for injuries to an employé of an interstate carrier, where the evidence was undisputed, and the injury did not result from a violation of the safety act, the employé's assumption of risk is a question of law. St. Louis & S. F. R. Co. v. Snowden, 48 Okl. 115, 149 P. 1083.

In action under federal Employers' Liability Act, where evidence is undisputed and injury is not caused by any violation of state statutory provisions for protection of employés, assumption of risk is a question of law; Const. art. 23, § 6, not applying. Chicago, R. I. & P. Ry. Co. v. Hessenflow (Okl.) 170 P. 1161.

Under Const. art. 23, § 6, whether the risk is an ordinary risk of employment under federal Employers' Liability Act, or is an ordinary risk known to servant or with knowledge of which he is chargeable is for the jury. Chicago, R. I. & P. Ry. Co. v. Ward (Okl.) 173 P. 212, certiorari granted 39 S. Ct. 10, 248 U. S. 555, 63 L. Ed. ——.

Under federal Employers' Liability Act, the questions whether an employé becomes aware of employer's negligence and risks arising therefrom, or whether the danger is so obvious that one of ordinary prudence under circumstances would have realized it, are for the jury. Wichita Falls & N. W. Ry. Co. v. Davern (Okl.) 177 P. 909.

[63] Blake v. Atlas Supply Co., 51 Okl. 426, 152 P. 81.

[64] Iowa Dairy Separator Co. v. Sanders, 140 P. 406, 40 Okl. 656; Central Mortgage Co. v. Michigan State Life Ins. Co., 143 P. 175, 43 Okl. 33; Brownell v. Moorehead (Okl.) 165 P. 408; Massachusetts Bonding & Ins. Co. v. Vance (Okl.) 180 P. 693; Leasure v. Hughes (Okl.) 178 P. 696.

The apparent authority of an agent is for the jury under all the facts and circumstances shown. St. Louis Cordage Mills v. Western Supply Co., 54 Okl. 757, 154 P. 646; Reeves & Co. v. Phillips, 53 Okl. 375, 156 P. 1179.

Question of agency is to be determined by jury upon all facts and circumstances connected with transaction, under proper instructions as to the law. Emerson-Brantingham Implement Co. v. Ritter (Okl.) 170 P. 482.

Where, in a guardian's action on a note, purchasers thereof from a third person to whom the note had been entrusted for sale intervened, claiming to own the note, and the evidence was conflicting, *held*, that whether such third person was agent of plaintiff or of the interveners was for the jury. Case v. Posey, 55 Okl. 163, 154 P. 1165.

[65] Massachusetts Bonding & Ins. Co. v. Vance (Okl.) 180 P. 693; Central Mortgage Co. v. Michigan State Life Ins. Co., 143 P. 175, 43 Okl. 33.

Question of extent of agent's authority is to be determined by jury upon all facts and circumstances connected with transaction, under proper instructions as to the law. Emerson-Brantingham Implement Co. v. Ritter (Okl.) 170 P. 482.

That one purports to act as agent for another, stating at the time that he is the agent, is not sufficient evidence on which to submit the question of agency.[66]

§ 809. —— Will contest

Under conflicting evidence in a will contest,[67] the due execution of the will,[68] testamentary capacity,[69] and undue influence[70] are questions for the jury; but the interpretation of a will is a

[66] R. P. Smith Sons & Co. v. Raines Dry Goods Co., 130 P. 133, 37 Okl. 39.

[67] In determining whether the evidence of contestants in a will contest is sufficient to require submission to the jury, the same rule applies as in ordinary civil cases, so that all the evidence in favor of contestants must be taken as true, and all contradictory evidence disregarded, and, if there is any substantial evidence tending to prove contestants' case, it must be submitted to the jury. In re Arnold's Estate, 82 P. 252, 147 Cal. 583.

Where on the first appeal the evidence was held insufficient to warrant denying probate, and the contestant on the second trial introduced no further evidence, direction of verdict for the proponent was proper. In re Stone's Estate, 174 Cal. 778, 164 P. 643.

[68] In re Cullberg's Estate, 169 Cal. 365, 146 P. 888.

[69] In re Dole's Estate, 81 P. 534, 147 Cal. 188.

A finding of testamentary incapacity will not be disturbed, where it is reasonably supported by evidence. Bilby v. Stewart, 55 Okl. 767, 153 P. 1173.

The evidence presented by will contestants should be viewed most favorably to them, and all contradictory testimony disregarded before directing a nonsuit. In re Ross' Estate, 159 P. 603, 173 Cal. 178. Testator's testamentary capacity *held* a jury question where he died 9 days after making the will, was 86 years old, had suffered two paralytic strokes, and was unable to remember or carry on a connected conversation. Id.

[70] In re Daly's Estate, 114 P. 787, 15 Cal. App. 329; In re Welch's Will, 91 P. 336, 6 Cal. App. 44.

The court has no authority to grant a nonsuit except in the cases specified in Code Civ. Proc. § 581, which does not include the withdrawal from the jury of an issue of undue influence, in a will contest, for alleged lack of sufficient evidence to support it. In re Higgins' Estate, 104 P. 6, 156 Cal. 257; In re Caspar's Estate, 155 P. 631, 172 Cal. 147; In re Flint's Estate, 179 Cal. 552, 177 P. 451.

Where there is no evidence which would justify a finding that undue influence was exercised in procuring the execution of a will such issue should not be submitted to the jury, since the presumption of undue influence is not raised by proof of interest and opportunity alone. In re Nelson's Estate, 64 P. 294, 132 Cal. 182.

That the jury in a will contest did not find against proponents on the issue whether the will was procured by fraud did not preclude it from considering evidence of fraud as bearing on the issue of undue influence. In re Snowball's Estate, 107 P. 598, 157 Cal. 301.

matter of law, to be determined from the language used and the facts and circumstances in proof.[71]

Where an application for the probate of a will is contested and tried before a jury ultimate facts only for the jury's finding, as to whether decedent was competent to make a will, and whether his mind was free from fraud, should be submitted, and not mere evidentiary facts, from which the court is required to reach a conclusion as a matter of law.[72]

§ 810. —— Malicious prosecution

In an action for malicious prosecution, what constitutes probable cause is a question of law for the court;[73] but whether certain facts necessary to constitute probable cause exist is for the jury.[74]

§ 811. —— Libel and slander

Whether a publication is libelous or privileged is for the court, where the language used is clear and the facts relative thereto are uncontroverted.[75]

Whether a fact which gives a publication a privileged character claimed for it is established by evidence is for the jury, and where evidence is conflicting court may instruct as to facts constituting a conditionally privileged communication, and leave jury to find whether those facts are proven.[76]

[71] In re Seay's Estate, 180 Cal. 304, 181 P. 58.

[72] In re Benton's Estate, 63 P. 775, 131 Cal. 472.

[73] Ball v. Rawles, 28 P. 937, 93 Cal. 222, 27 Am. St. Rep. 174; Lacey v. Porter, 37 P. 635, 103 Cal. 597; Bell v. Keepers, 14 P. 542, 37 Kan. 64; Hopkins v. Stites (Okl.) 173 P. 449; Goad v. Brown (Okl.) 175 P. 767; Robberson v. Gibson, 62 Okl. 306, 162 P. 1120; Dunnington v. Loeser, 48 Okl. 636, 149 P. 1161, rehearing denied 48 Okl. 636, 150 P. 874; Eastin v. Stockton Bank, 4 P. 1106, 66 Cal. 123, 56 Am. Rep. 77; Fulton v. Onesti, 6 P. 491, 66 Cal. 575; Smith v. Liverpool & London & Globe Ins. Co., 40 P. 540, 107 Cal. 432; Seabridge v. McAdam, 41 P. 409, 108 Cal. 345; Parli v. Reed, 2 P. 635, 30 Kan. 534; Michael v. Matson, 105 P. 537, 81 Kan. 360, L. R. A. 1915D, 1.

[74] Drumm v. Cessnum, 58 Kan. 331, 49 P. 78; Atchison, T. & S. F. R. Co. v. Smith, 55 P. 272, 60 Kan. 4; Hess v. Oregon German Baking Co., 49 P. 803, 31 Or. 503.

[75] Spencer v. Minnick, 139 P. 130, 41 Okl. 613.

Whether the published article is libelous per se is a question of law for the court. McKenney v. Carpenter, 141 P. 779, 42 Okl. 410.

Where a publication is conditionally privileged, it is a matter of law for the court to determine whether there is any evidence of malice, and, if there is none, to direct the verdict for defendant. Tuohy v. Halsell, 128 P. 126, 35 Okl. 61, 43 L. R. A. (N. S.) 323, Ann. Cas. 1916B, 1110.

[76] Bland v. Lawyer-Cuff Co. (Okl.) 178 P. 885.

Where there is no dispute as to what the publication was, when or about

Where the defamatory words are not actionable per se, the court must construe the words, and the jury must determine the intent.[77] It is the duty of the court to determine whether the language used in the publication can fairly or reasonably be construed to have the meaning imputed to it in the petition;[78] but where the evidence wholly fails to connect any of the defendants by positive testimony with acts charged, demurrer to evidence should have been sustained.[79]

§ 812. —— Weight of evidence and credibility of witnesses

The weight and sufficiency of evidence[80] and the credibility of witnesses, where the evidence is conflicting, are for the jury,[81]

what it was made, and the language is unambiguous, the question whether the publication was privileged was for the court. Cobb v. Oklahoma Pub. Co., 140 P. 1079, 42 Okl. 314. Under conflicting evidence in an action for libel for publishing a report of proceedings, held not error to submit to the jury whether the report was fair or made with malicious intent, and whether plaintiff was falsely charged with crime. Id.

Where there is no dispute as to the circumstances under which a publication was made, the question whether the occasion was privileged is for the court, but, if the facts giving the publication a privileged character are established by evidence, the question is for the jury under an instruction as to what facts constitute privilege. Hubbard v. Cowling, 129 P. 714, 36 Okl. 603.

Where the language of an alleged libel is clear and unambiguous, and the facts are uncontroverted with reference to whether or not it was libelous, or its publication privileged, such questions are for the court and not the jury. Bodine v. Times-Journal Pub. Co., 110 P. 1096, 26 Okl. 135, 31 L. R. A. (N. S.) 147.

In an action for libel under Rev. Laws 1910, § 4959, evidence held to require submission of case to jury. Dawkins v. Billingsley (Okl.) 172 P. 69, 12 A. L. R. 144.

[77] Phœnix Printing Co. v. Robertson, 80 Okl. 191, 195 P. 487.

[78] Kee v. Armstrong, Byrd & Co., 75 Okl. 84, 182 P. 494, 5 A. L. R. 1349.

[79] Hall v. Taylor, 59 Okl. 207, 158 P. 373.

[80] Missouri, K. & T. R. Co. v. L. A. Watkins Merchandise Co., 92 P. 1102, 76 Kan. 813; Strickler v. Gitchel, 78 P. 94, 14 Okl. 523; Silverwood v. Carpenter, 51 Okl. 745, 152 P. 381.

If it is necessary for the court to weigh the evidence and the facts are such that reasonable minds might disagree, it is a question for the jury. Farmers' Nat. Bank of Tecumseh v. McCall, 106 P. 866, 25 Okl. 600, 26 L. R. A. (N. S.) 217.

[81] Silverwood v. Carpenter, 51 Okl. 745, 152 P. 381; Folley v. Chicago, R. I. & P. Ry. Co., 84 P. 1090, 16 Okl. 32; Quapaw Mining Co. v. Cogburn, 78 Okl. 227, 190 P. 416.

Where the only testimony is that of an interested party and is inconsistent, the court should not direct a verdict. Moore v. First Nat. Bank of Iowa City,

regardless of the fact that the larger number of witnesses testified for one side.[82]

Where different persons might reasonably draw different inferences from undisputed facts, the proper inference is a question of fact for the jury.[83]

It is the province of a jury to decide upon what facts have been proven, but not to decide upon what an admitted fact tends to prove.[84]

§ 813. —— Uncontroverted evidence

The rule that matters shown by uncontroverted evidence need not be submitted to the jury [85] is not absolute; for, when undisput-

121 P. 626, 30 Okl. 623. The credibility of witnesses and effect to be given to inconsistent testimony held questions of fact. Id.

It is the duty of the court to submit a question of fact to the jury, where the evidence in regard thereto is conflicting. Robinson v. Lamoureaux, 80 P. 595, 71 Kan. 850; Sun Ins. Office of London v. Western Woolen Mill Co., 82 P. 513, 72 Kan. 41; Taylor v. Insurance Co. of North America, 105 P. 354, 25 Okl. 92, 138 Am. St. Rep. 906.

Where issues of fact are presented by the pleadings and supported by conflicting evidence the case is for the jury. Adams v. Coon, 129 P. 851, 36 Okl. 644, 44 L. R. A. (N. S.) 624.

Where plaintiff's evidence reasonably tends to sustain the issues, and defendant's evidence conflicts therewith, the question is for the jury. Gann v. Ball, 110 P. 1067, 26 Okl. 26; Midland Savings & Loan Co. v. Sutton, 30 Okl. 448, 120 P. 1007.

Questions raised between allegations in original petition and testimony denying or explaining allegations is one of fact for the jury. Letcher v. Maloney (Okl.) 172 P. 972.

[82] Kali Inla Coal Co. v. Ghinelli, 55 Okl. 289, 155 P. 606.

[83] Kemp v. Chicago, R. I. & P. Ry. Co., 138 P. 621, 91 Kan. 477.

An inference reasonably, though not necessarily, deducible from the evidence, will not be withdrawn from the jury. Miller v. Marriott, 48 Okl. 179, 149 P. 1164.

In suit for conversion by mortgagee whose mortgage, prior in date, was not witnessed or acknowledged, though filed, against a junior mortgagee who properly recorded his mortgage and sold property and applied proceeds on his debt, and who had seen senior mortgage on file, but deemed it void, whether he was not put upon inquiry which would have shown prior mortgage was for jury, and directed verdict for him was error. Blevins v. W. A. Graham Co. (Okl.) 182 P. 247.

In an action against a carrier for negligently billing a shipment for a wrong destination, the issue whether the agent of the company was negligent, or whether the shipper was negligent in failing to examine the bill of lading, was for the jury. Ft. Smith & W. Ry. Co. v. Harrison, 39 Okl. 1, 133 P. 222.

[84] Atchison, T. & S. F. R. Co. v. Lamoreux, 49 P. 152, 5 Kan. App. 813.

[85] Facts established by uncontroverted evidence need not be submitted to the jury for finding. Byers v. Ingraham, 51 Okl. 440, 151 P. 1061.

ed facts are capable of more than one reasonable inference, the question is for the jury.[86]

Even though testimony is undisputed it should be so convincing that all reasonable men must draw same conclusion from facts proven before the court can sustain a demurrer to the evidence or direct verdict.[87]

§ 814. Motions and demurrer

Where at the close of all the evidence the defendant demurs to the plaintiff's evidence, the demurrer will be treated as a motion to direct a verdict in the defendant's favor.[88]

A motion for a nonsuit is in effect but a demurrer to the evidence.[89]

A motion to withdraw a case from the jury and render judgment for the plaintiff upon all the evidence presents to the court the same question as a motion to direct the verdict in favor of the moving party, and this should be done where the party on whom rests the burden of proof has wholly failed to present any evidence to support his case, and there are no disputed facts for the jury to pass upon.[90]

A motion to direct a verdict in favor of the defendant is substantially equivalent to a demurrer to the plaintiff's evidence.[91]

§ 815. Demurrer to evidence

When the party on whom rests the burden of proof has closed his evidence, the adverse party may interpose a demurrer thereto upon the ground that no cause of action or defense is proved.[92] A demurrer in the language of the statute is sufficient.[93]

[86] Waldrep v. Exchange State Bank (Okl.) 197 P. 509.

[87] City of Durant v. Allen (Okl.) 168 P. 205.

A demurrer to the evidence will not be sustained, nor will a verdict be directed, unless the evidence, though undisputed, is so convincing that all reasonable men must draw the same conclusion from it. Rogers v. O. K. Bus & Baggage Co., 46 Okl. 289, 148 P. 837, Ann. Cas. 1917B, 581.

Where defendant offered no evidence in rebuttal, but denied plaintiff's case,

[88] Chickasha Inv. Co. v. Phillips, 58 Okl. 760, 161 P. 223; Nail v. State (Okl. Cr.) 192 P. 592.

[89] Lyon v. Lyon, 39 Okl. 111, 134 P. 650.

[90] Frick v. Reynolds, 52 P. 391, 6 Okl. 638.

[91] Sullivan v. Phenix Ins. Co. of Brooklyn, 8 P. 112, 34 Kan. 170.

[92] Rev. Laws 1910, § 5002, subd. 3.

[93] Hargrove v. Bourne, 47 Okl. 484, 150 P. 121.

A demurrer to the evidence will not reach a misjoinder [94] or defect of parties.[95]

Where an answer contains several defenses, and at the conclusion of defendants' evidence plaintiff interposes a demurrer to the evidence, and the court sustains it as to one defense and overrules it as to the other, it does not withdraw from the jury the evidence applicable to the remaining defenses.[96]

It is not error to sustain a demurrer to the evidence on behalf of a part of the defendants, where there is no evidence tending to prove a cause of action against them.[97]

That defendant elicits from plaintiff's witness at the end of the cross-examination testimony in support of the defense does not preclude him from challenging the sufficiency of plaintiff's testimony by demurrer, or the court from deciding whether plaintiff's evidence was sufficient to establish a cause of action.[98]

It is not error for the trial court to overrule a demurrer to the evidence where such demurrer does not tender all of the evidence in the case.[99]

In a personal injury action, if the facts proved are sufficient to sustain a verdict upon a demurrer filed to the evidence by the defendant, it is the duty of the court to call a jury to assess the damages, or assess the damages itself.[1]

On a demurrer to plaintiff's evidence in a personal injury action, it is competent to consider the entire conduct of the trial by defendant, its pleading, cross-examination of witnesses, and admissions; and if these, coupled with the deductions which may be drawn from the evidence, establish a responsibility, the demurrer must be overruled.[2]

and plaintiff's evidence was such that men of ordinary intelligence might draw different conclusions direction of verdict for plaintiff was error. Reserve Loan Life Ins. Co. v. Isom (Okl.) 173 P. 841.

94 Groenmiller v. Kaub, 73 P. 100, 67 Kan. 844.

95 Larimore v. Miller, 96 P. 852, 78 Kan. 459.

96 Troutman v. Behoteguy, 76 P. 446, 69 Kan. 176.

97 Barnes v. Davis, 30 Okl. 511, 120 P. 275.

98 Arnold v. C. Hoffman & Son Milling Co., 143 P. 413, 93 Kan. 54.

99 City of Oklahoma City v. Welsh, 41 P. 598, 3 Okl. 288.

1 Pitman v. City of El Reno, 37 P. 851, 2 Okl. 414, judgment reversed Pittman v. Same, 46 P. 495, 4 Okl. 638.

2 Shawnee Light & Power Co. v. Sears, 95 P. 449, 21 Okl. 13.

Where one is sued on a note and on the trial fails to prove any defense, a demurrer to his evidence should be sustained and judgment rendered for plaintiff.[3]

§ 816. —— Effect as admission

A demurrer to the evidence admits all facts which the evidence tends to establish and all reasonable inferences therefrom,[4] including legal presumptions and admissions, either in the pleadings or otherwise,[5] and withdraws unfavorable evidence adduced by the demurrant.[6]

[3] Willoughby v. Ball, 90 P. 1017, 18 Okl. 535.

[4] D'Yarmett v. Cobe, 51 Okl. 113, 151 P. 589; McKone v. McConkey, 77 Okl. 3, 185 P. 520; Wm. Cameron & Co. v. Henderson, 140 P. 404, 40 Okl. 648; Crow v. Crow, 139 P. 122, 40 Okl. 455; Midland Valley R. Co. v. Larson, 138 P. 173, 41 Okl. 360; Sartain v. Walker, 60 Okl. 258, 159 P. 1096; Ft. Smith & W. R. Co. v. Knott, 60 Okl. 175, 159 P. 847; Midland Valley R. Co. v. Ogden, 60 Okl. 74, 159 P. 256; Rose v. Woldert Grocery Co., 54 Okl. 566, 154 P. 531; Marshall Mfg. Co. v. Dickerson, 55 Okl. 188, 155 P. 224; Helm v. Mickleson (Okl.) 170 P. 704; Felt v. Westlake (Okl.) 174 P. 1041; St. Louis & S. F. R. Co. v. Snowden, 48 Okl. 115, 149 P. 1083; Miller v. Marriott, 48 Okl. 179, 149 P. 1164; J. I. Case Threshing Mach. Co. v. Rennie (Okl.) 177 P. 548; Anthony v. Bliss, 39 Okl. 237, 134 P. 1122; Ziska v. Ziska, 95 P. 254, 20 Okl. 634, 23 L. R. A. (N. S.) 1; Shawnee Light & Power Co. v. Sears, 95 P. 449, 21 Okl. 13; Anderson v. Kelly, 57 Okl. 109, 156 P. 1167; Wolf v. Washer, 4 P. 1036, 32 Kan. 533; Christie v. Barnes, 6 P. 599, 33 Kan. 317; Beutel v. Standou, 7 Kan. App. 813, 53 P. 836; Jaffray v. Wolf, 1 Okl. 312, 33 P. 945; Myers v. First Presbyterian Church of Perry, 69 P. 874, 11 Okl. 544; Edmisson v. Drumm-Flato Commission Co., 73 P. 958, 13 Okl. 440; (1905) Conklin v. Yates, 83 P. 910, 16 Okl. 266; Mentze v. Rice, 172 P. 516, 102 Kan. 855; Smith v. Rockett, 79 Okl. 244, 192 P. 691; Kline v. Kollman, 79 Okl. 179, 192 P. 208; Boatman v. Coverdale, 80 Okl. 9, 193 P. 874; Singer v. Citizens' Bank of Headrick, 79 Okl. 267, 193 P. 41.

A demurrer by defendant to the evidence admits the truth of all the evidence offered on the part of plaintiff, together with such inferences and conclusions as may reasonably be drawn therefrom. Flesher v. Callahan, 122 P. 489, 32 Okl. 283.

It is only where the evidence and all the inferences therefrom are insufficient to support a verdict for plaintiff that demurrer thereto can properly be sustained. Petroleum Iron Works Co. v. Bullington, 61 Okl. 311, 161 P. 538.

The test on demurrer to evidence is that all the facts which the evidence tends to prove and reasonable inferences therefrom, are admitted, and court cannot weigh conflicting evidence, but must treat as withdrawn that which is most favorable to demurrant. Rawlings v. Ufer, 61 Okl. 299, 161 P. 183.

[5] Bean v. Rumrill (Okl.) 172 P. 452.

[6] Lyon v. Lyon, 39 Okl. 111, 134 P. 650.

Under the provisions of St. 1890 relative to procedure, where defendant demurs to the evidence, only such evidence as tends to make out plaintiff's case

§ 817. —— What rulings proper

A demurrer to the evidence should be sustained where all the evidence and inferences deducible therefrom would not support a judgment for the adverse party.[7]

can be considered, and defendant's evidence must be regarded as withdrawn. Jaffray v. Wolf, 4 Okl. 303, 47 P. 496.

On a demurrer to evidence only evidence favorable to the demurree is considered. Smith v. Rockett, 79 Okl. 244, 192 P. 691; Missouri Can Co. v. Ross, 83 P. 616, 72 Kan. 669.

[7] Hargrove v. Bourne, 47 Okl. 484, 150 P. 121; Grossman Co. v. White, 52 Okl. 117, 152 P. 816; Duncan v. Keechi Oil & Gas Co., 75 Okl. 98, 181 P. 709; Vinita Electric Light, Ice & Power Co. v. Carpenter, 46 Okl. 561, 149 P. 126; Remarkis v. Reid, 64 Okl. 104, 166 P. 728; Burton v. Doyle (Okl.) 165 P. 169; Bell v. Lynde-Bowman Darby Co., 38 Okl. 172, 132 P. 477; Eoff v. Lair (Okl.) 156 P. 185; Farmers' State Bank of Jefferson v. Jordon, 61 Okl. 15, 160 P. 53; New York Plate Glass Ins. Co. v. Wright, 61 Okl. 47, 160 P. 54; Kiff v. Atchison, T. & S. F. R. Co., 4 P. 401, 32 Kan. 263; Gollober v. Lindner, 53 P. 774, 7 Kan. App. 812; Archer v. United States, 60 P. 268, 9 Okl. 569; Schump Land Co. v. Probst, 139 P. 1024, 92 Kan. 103; Shawnee Fire Ins. Co. v. Thompson & Rowell, 30 Okl. 466, 119 P. 985.

In an action to foreclose a mortgage after the death of the makers, where the guardian ad litem of the defendant minor heirs of the makers files a general denial, and the only evidence is that of the execution of the note and mortgage, it is error to overrule a demurrer to the evidence. Sims v. Hedges, 123 P. 155, 32 Okl. 683.

Where a petition, in a widow's action for death of her husband, alleged that no administrator had been appointed and plaintiff offered no proof thereof, it was error to overrule defendant's demurrer to the evidence. Frederick Cotton Oil & Mfg. Co. v. Clay, 50 Okl. 123, 150 P. 451.

In action for breach of oral contract to put down well and to furnish casings, etc., where petition showed cause of action was barred, and did not allege written acknowledgment of liability within limitations, held, that overruling of demurrer to evidence was error. Froage v. Webb (Okl.) 165 P. 150.

In action by Indian for possession of certain realty claimed under and through plaintiff's security deed and to cancel instruments in writing alleged to cloud plaintiff's title held, in view of Rev. Laws 1910, §§ 1156, 1158, relating to security deeds and notice that the sustaining of a demurrer to plaintiff's evidence was error. Armstrong v. Phillips, 76 Okl. 192, 181 P. 715.

Where plaintiff sued for negligent injuries, alleging two causes of action, one of which was for willful and wanton negligence, and the evidence failed to show willfulness or wantonness, a demurrer to the evidence as to that cause of action was improperly overruled. Whitman v. Atchison, T. & S. F. Ry. Co., 116 P. 234, 85 Kan. 150, 34 L. R. A. (N. S.) 1029, Ann. Cas. 1912D, 722.

None of the testimony given for plaintiffs, in an action to hold defendant liable for work done by them, being substantially inconsistent with their other testimony that they were subcontractors of one who, to their knowledge, was an independent contractor for doing the work for defendant, a demurrer to

When a party upon whom rests the burden of the issues, upon a trial introduces evidence which, uncontroverted, establishes a cause of action in his favor, and then proceeds to introduce evidence which prima facie defeats his cause of action, and then rests his

the evidence was properly sustained. Carter v. Prairie Oil & Gas Co., 104 P. 563, 80 Kan. 792.

In action against drawee bank, buyer, and its agent to recover price of certain hogs, evidence held insufficient to entitle plaintiff to recover against the bank and the buyer, so that its demurrer to the evidence was properly sustained. Schenbeck v. First Nat. Bank (Okl.) 169 P. 619, L. R. A. 1918B, 1066.

Where the question to be determined was whether a sale of wheat was accompanied by immediate delivery and change of possession, and there was no evidence from which it could be fairly inferred that any open positive change ever took place, and there was no such evidence of delivery as the circumstances of the case would reasonably allow, the court, on demurrer to the evidence, was bound to hold it as a matter of law that the attempted sale was fraudulent as to the creditors of the vendor. Walters v. Ratliff, 61 P. 1070, 10 Okl. 262.

In suit to set aside for insufficient delivery, a deed delivered to third person for delivery to grantees at death of grantor, where at grantor's death deed was turned over to grantees and administratrix of grantor, who placed it of record, demurrer to evidence was properly sustained. Shaffer v. Smith, 53 Okl. 352, 156 P. 1188.

Where a petition in an action for the recovery of money alleged that defendant appropriated it to his own use, and the evidence does not reasonably tend to show such appropriation, it is not error to sustain a demurrer thereto. Norman v. Groves, 97 P. 561, 22 Okl. 98.

In stockholder's action to enjoin other stockholders, and for a receivership and a winding up of the corporation, demurrer to plaintiff's evidence held properly sustained. Bell v. Northrop-Bell Oil & Gas Co. (Okl.) 171 P. 1115.

In an action for damages by a wife against her husband's parents for alienating her husband's affections, evidence that defendants gave their son a home, but refused the same to plaintiff; that they had both told her, in her husband's presence, that she was filthy and dirty, and unfit to raise a family; and that plaintiff's father-in-law told a third person, who had given to plaintiff a temporary home, that he had been trying to separate his son and plaintiff for some time, and had succeeded, and that now he intended to keep them apart, is insufficient, as against a demurrer to the evidence. Sheriff v. Sheriff, 56 P. 960, 8 Okl. 124.

Where a petition states a cause of action, although plaintiff is mistaken as to amount of recovery to which he is entitled, and his evidence reasonably tends to support allegations of petition, a demurrer to the evidence should not be sustained. Deming Inv. Co. v. Britton (Okl.) 179 P. 468.

In action for specific performance of agreement between plaintiff's mother and defendant that defendant and her husband would take plaintiff into their home and raise her as their own child, and that on their death she would inherit as their child as if they died intestate, demurrer to plaintiff's evidence held properly sustained. Pantel v. Bower, 104 Kan. 18, 178 P. 241.

case, and the opposite party demurs to the evidence, it is error for the court to overrule the demurrer and to render judgment in favor of the party who produced the evidence.[8]

On a demurrer to the evidence, that of the party against whom demurrer is sought should be given full credence and considered in the most favorable light.[9]

The court may disregard incompetent testimony admitted over proper objections.[10] Conflicting evidence cannot be weighed.[11] Therefore a demurrer to the evidence, or a motion to direct a verdict, should not be sustained where there is any substantial conflict in the evidence.[12]

The credibility of a witness cannot be considered,[13] nor should the court determine which one of several fair inferences may be drawn from the proven facts.[14] The sufficiency of the evidence, in law, is the only question.[15]

Where evidence is conflicting it is error to sustain a demurrer to the evidence, however strongly the preponderance may be against

[8] Kibby v. Gibson, 83 P. 968, 72 Kan. 375.

[9] Maryland Casualty Co. v. Cherryvale Gas, Light & Power Co., 162 P. 313, 99 Kan. 563, L. R. A. 1917C, 487; Starkweather v. Dunlap, 103 Kan. 425, 173 P. 1122; Bushey v. Coffman, 173 P. 341, 103 Kan. 209; Matassarin v. Wichita R. & Light Co., 163 P. 796, 100 Kan. 119; Feighley v. C. Hoffman & Son Milling Co., 165 P. 276, 100 Kan. 430.

Where the petition states a cause of action and the proof fairly sustains same, a demurrer to the evidence should be overruled. T. H. Rogers Lumber Co. v. M. W. Judd Lumber Co., 52 Okl. 387, 153 P. 150.

[10] Fuss v. Cocannouer (Okl.) 172 P. 1077; Nance v. Oklahoma Fire Ins. Co., 31 Okl. 208, 120 P. 948, 38 L. R. A. (N. S.) 426; Felt v. Westlake (Okl.) 174 P. 1041.

On a demurrer to evidence the trial court may disregard incompetent evidence. Thorp Oil & Specialty Co. v. Home Oil Refining Co., 79 Okl. 225, 192 P. 573; Gillett v. Burlington Ins. Co., 36 P. 52, 53 Kan. 108.

[11] Moss v. Hunt, 40 Okl. 20, 135 P. 282; Edmisson v. Drumm-Flato Commission Co., 73 P. 958, 13 Okl. 440; Mottin v. Board of Com'rs of Leavenworth County, 133 P. 165, 89 Kan. 742; Kerr v. Kerr, 116 P. 880, 85 Kan. 460; Buoy v. Clyde Milling & Elevator Co., 75 P. 466, 68 Kan. 436; Coon v. Atchison, T. & S. F. Ry. Co., 89 P. 682, 75 Kan. 282; Jones v. Adair, 91 P. 78, 76 Kan. 343; Hennis v. Bowers, 100 P. 71, 79 Kan. 463; St. Louis & S. F. Ry. Co. v. Toomey, 49 P. 819, 6 Kan. App. 410; Fuller v Torson, 56 P. 512, 8 Kan. App. 652; Hyland v. Atchison, T. & S. F. Ry. Co., 151 P. 1107, 96 Kan. 432.

[12] Collier v. Gannon, 137 P. 1179, 40 Okl. 275.

[13] Terry v. Kansas Gravel Co., 143 P. 485, 93 Kan. 125.

[14] Kerr v. Kerr, 116 P. 880, 85 Kan. 460.

[15] Wolf v. Washer, 4 P. 1036, 32 Kan. 533; Coy v. Missouri Pac. Ry. Co., 76 P. 844, 69 Kan. 321.

the party on whom rests the burden of the issues in the opinion of the court.[16]

The demurrer should be overruled, where any question of fact is presented.[17]

Where the declaration states a cause of action in tort, and fails to state any facts sounding in contract, and the evidence fails to prove the tort, but tends to prove a right of action on contract, the court should sustain a demurrer to the evidence.[18]

On the other hand, judgment on the evidence should not be rendered where a jury is a matter of right, and there is evidence authorizing submission of the case to the jury.[19]

A demurrer to plaintiff's evidence should not be sustained where such evidence does not clearly disprove or fail to establish his

[16] Wingfield v. McClintock, 113 P. 394, 85 Kan. 207, judgment affirmed on rehearing 116 P. 488, 85 Kan. 452.

On a demurrer to evidence, the question of preponderance of evidence has no bearing. The evidence must have failed utterly to prove the facts at issue. Brown v. Atchison, T. & S. F. Ry. Co., 1 P. 605, 31 Kan. 1.

The court must be able to say as a matter of law that the party introducing the evidence has not proved his case. Conklin v. Yates, 83 P. 910, 16 Okl. 266.

It is error to sustain a demurrer to the evidence because of contradictions between plaintiff's testimony in chief and on cross-examination, if there is any evidence whatever to support plaintiff's claim. Acker v. Norman, 84 P. 531, 72 Kan. 586.

It is error to sustain a demurrer to plaintiff's evidence because it is conflicting and certain portions of plaintiff's own testimony conflict with other portions thereof. Smith v. Schriver, 138 P. 584, 91 Kan. 582.

[17] Thurston v. Fritz, 138 P. 625, 91 Kan. 468, 50 L. R. A. (N. S.) 1167, Ann. Cas. 1915D, 212.

A demurrer to evidence of a partner that he did not authorize his copartner to sign the note sued on is properly overruled, where such evidence has any probative value and tends to show nonliability of demurrant. Exchange State Bank v. Jacobs, 156 P. 771, 97 Kan. 798.

[18] Ellis v. Flaherty, 70 P. 586, 65 Kan. 621.

[19] O'Neal v. Bainbridge, 146 P. 1165, 94 Kan. 518, Ann. Cas. 1917B, 293; Wichita Falls & N. W. Ry. Co. v. Puckett, 53 Okl. 463, 157 P. 112; Zehr v. Champlin, 60 Okl. 242, 159 P. 1185; St. Louis & S. F. R. Co. v. Akard, 60 Okl. 4, 159 P. 344; Thorne v. Milliken, 57 Okl. 735, 157 P. 914; Rentie v. McCoy, 128 P. 244, 35 Okl. 77; Avery v. Howell, 153 P. 532, 96 Kan. 657; Lyon v. Lyon, 39 Okl. 111, 134 P. 650.

Where all the evidence and the reasonable inferences therefrom in defendant's favor taken as true, will warrant a verdict in his favor, it is error to sustain plaintiff's demurrer to such evidence. Moppin v. Norton, 137 P. 1182, 40 Okl. 284, Ann. Cas. 1915D, 1042.

right of recovery.[20] It should be overruled, unless there has been a total failure upon the part of plaintiff to prove a case, or some material fact in issue.[21]

[20] Walsh v. Kansas Fuel Co., 137 P. 941, 91 Kan. 310, 50 L. R. A. (N. S.) 686; McCall Bros. v. Farley & Skinner, 39 Okl. 389, 135 P. 339; Mentze v. Rice, 172 P. 516, 102 Kan. 855; Holmes v. Culver, 133 P. 164, 89 Kan. 698; Chase v. Atchison, T. & S. F. Ry. Co., 79 P. 153, 70 Kan. 546; Davis v. Atchison, T. & S. F. Ry. Co., 104 Kan. 604, 180 P. 195; Horne v. Hegwer Salt & Lumber Co., 35 P. 200, 52 Kan. 617; Jackson v. Uncle Sam Oil Co. of Kansas, 156 P. 756, 97 Kan. 674; Brownson v. Perry, 81 P. 197, 71 Kan. 578; Mulvane v. Sedgley, 61 P. 971, 10 Kan. App. 574, judgment affirmed 64 P. 1038, 63 Kan. 105, 55 L. R. A. 552; Hughes v. Delautre, 108 P. 803, 82 Kan. 548; Lewis v. Harvey, 101 Kan. 673, 168 P. 856; Bushey v. Coffman, 173 P. 341, 103 Kan. 209.

A demurrer to the plaintiff's evidence will not be sustained, where there are inferences favorable to the plaintiff. Singer v. Citizens' Bank of Headrick, 79 Okl. 267, 193 P. 41.

In an action for conspiracy to defraud plaintiff of his stock in a bank and oust him from his position as president, held that a demurrer to plaintiff's evidence was properly overruled. Felt v. Westlake (Okl.) 174 P. 1041.

In an action for an assault, where plaintiff and one other witness testified that the assault was committed, a demurrer to evidence on the ground that no cause of action was proved was properly overruled. Willet v. Johnson, 76 P. 174, 13 Okl. 563.

Where, in an action for damages to a shipment of sheep from delay in furnishing a car, the evidence reasonably tended to show that plaintiff had sus-

[21] Brown v. Atchison, T. & S. F. Ry. Co., 1 P. 605, 31 Kan. 1; Gardner v. King, 15 P. 920, 37 Kan. 671; Wilson v. Beck, 24 P. 957, 44 Kan. 497.

A demurrer to evidence reasonably sustaining a petition stating a cause of action should be overruled. Missouri, O. & G. Ry. Co. v. Smith, 55 Okl. 12, 155 P. 233; Alexander Drug Co. v. O'Dell, 52 Okl. 662, 153 P. 114; Hess v. Sturdavent, 59 Okl. 239, 158 P. 905; Sartain v. Walker, 60 Okl. 258, 159 P. 1096; Lisle v. Anderson, 61 Okl. 68, 159 P. 278, L. R. A. 1917A, 128; Anoatubby v. Pennington, 46 Okl. 221, 148 P. 828; First State Bank of Addington v. Latimer, 48 Okl. 104, 149 P. 1099; Wm. Cameron & Co. v. Henderson, 140 P. 404, 40 Okl. 648; King v. City of Parsons, 149 P. 699, 95 Kan. 654; Horine v. Hammond, 146 P. 1144, 94 Kan. 579; Anderson v. Heasley, 148 P. 738, 95 Kan. 572; Moore v. Moore, 150 P. 230, 93 Kan. 697, 96 Kan. 95; Kansas City, Ft. S. & G. R. Co. v. Foster, 18 P. 285, 39 Kan. 329; Cargill Commission Co. v. Mowery, 161 P. 634, 99 Kan. 389, judgment modified on rehearing, 162 P. 313, 99 Kan. 389; State v. Gerhards, 162 P. 1149, 99 Kan. 462; Litsch v. Kansas Gas & Electric Co., 148 P. 632, 95 Kan. 496; Brown v. Cruse, 90 Kan. 306, 133 P. 865.

Where there is a variance in the reply from the cause of action stated in the petition, and the burden of proof is on the defendant, and evidence is offered which would sustain a partial defense to the cause of action as modified by the reply, a demurrer should not be sustained to the evidence. Marion Mfg. Co. v. Bowers, 80 P. 565, 71 Kan. 260.

A demurrer to the evidence should be overruled, where the evidence, with the inferences deducible therefrom, is sufficient to support a verdict for the party offering same.[22]

§ 818. —— Cure of error

Any error in overruling demurrer at close of plaintiff's case is cured, where testimony introduced by defendant supplies any deficiencies in testimony of plaintiff.[23]

tained the damages claimed, and that defendant unlawfully caused same, a demurrer to the evidence was properly overruled. Midland Valley R. Co. v. Larson, 138 P. 173, 41 Okl. 360.

In an action by a principal against his agent to recover in part certain commission alleged to have been erroneously paid, where on answer and counterclaim for the balance the original action is dismissed, and the case is tried on the counterclaim, and the evidence of plaintiff shows that defendant, while his agent in the purchase of lands, unknown to him, received a commission from the agents of the vendor, is a sufficient defense to the action on the counterclaim, and a demurrer to such evidence was wrongfully sustained. Plotner v. Chillson & Chillson, 95 P. 775, 21 Okl. 224, 129 Am. St. Rep. 776.

In an action for damages for the wrongful cutting of timber on plaintiff's land, held, that court properly overruled demurrer to plaintiff's evidence. Kilgore v. Rowland (Okl.) 172 P. 43.

In action upon notes for balance due after crediting proceeds of chattel mortgage, held, that demurrer to plaintiff's evidence was improperly sustained, in view of admissions made by demurrer. J. I. Case Threshing Mach. Co. v. Rennie (Okl.) 177 P. 548.

In suit by surviving husband to quiet title, the sustaining of a demurrer to his evidence was error, where he testified that the realty was purchased after his marriage to defendants' mother, and with proceeds of sale of property owned by him before marriage, excepted from antenuptial contract. Watson v. Stone (Okl.) 171 P. 336.

In chattel mortgagee's action for conversion of mortgaged property then in mortgagor's possession, evidence on theory of a suit to impress a trust on proceeds of sale did not support the cause of action, and the overruling of a demurrer thereto was error. First Nat. Bank v. City Nat. Bank of Wellington, Tex. (Okl.) 175 P. 253.

[22] Reynolds v. Brooks, 49 Okl. 188, 152 P. 411.

Unless the evidence and all the justifiable inferences are insufficient to support a verdict for plaintiff, it is not error to overrule a demurrer thereto. Baker-Hanna-Blake Co. v. Paynter-McVicker Grocery Co. (Okl.) 174 P. 265.

In replevin for possession of more than one item of property, if the evidence supports plaintiff's right to recover any one item, a general demurrer to the evidence is properly overruled. Hamilton v. Brown, 31 Okl. 213, 120 P. 950.

[23] Beard v. Davis, 57 Okl. 17, 156 P. 631; Rutledge v. Jarvis, 60 Okl. 66, 158 P. 586; Gulf, C. & S. F. Ry. Co. v. Beasley (Okl.) 168 P. 200.

Where demurrer to plaintiff's evidence was overruled, and defendant thereafter offered eivdence on same points and cause was submitted without ex-

§ 819. —— Trial by court

A demurrer to the evidence may be entertained on a trial by the court without a jury.[24]

While the statute does not expressly authorize a demurrer to evidence in cases tried to the court without a jury, that practice is followed by the courts.[25]

In such case the court's ruling must be tested by the same rules as obtain in jury cases, unless he sustains the demurrer and it affirmatively appears that he afterwards weighed all the evidence as upon final submission.[26]

In a suit in equity tried to the court, where there is any evidence reasonably tending to establish plaintiff's petition, it is error to sustain a demurrer to the evidence.[27]

ception to sufficiency of evidence and it sustained the judgment, it will not be disturbed. Glaze v. Metcalf Thresher Co. (Okl.) 168 P. 219.

Where trial court overruled demurrer to plaintiff's evidence, and thereafter both parties introduced further and additional evidence sufficient to make out a case for plaintiff, a judgment in his favor will not be disturbed, though original evidence was insufficient. Tankersley v. Castanien, 63 Okl. 18, 162 P. 191.

[24] Chicago Lumber Co. v. Merrimack River Sav. Bank, 34 P. 1045, 52 Kan. 410.

[25] Bailey v. Privett, 64 Okl. 56, 166 P. 150.

Where trial is had to the court, it is not error to weigh plaintiff's evidence at the close thereof and pronounce judgment for defendant. Tiger v. Ward, 60 Okl. 36, 158 P. 941.

Court trying action without a jury must eventually weigh testimony to determine where preponderance is, and may do so at earliest possible time when plaintiff's rights will not be thereby cut off or impaired, and when plaintiff has put in all his proof his rights will not be impaired if court then determines what has been proven. Lowrance v. Henry, 75 Okl. 250, 182 P. 489.

[26] Rev. Laws 1910, § 5002, relative to demurrers to evidence, does not expressly authorize such demurrer in cases tried to the court, and the judge in such case may decline to pass upon a demurrer. A demurrer to the evidence, in an action for divorce, withdraws, and requires the court to ignore, a proposition of reconciliation made by demurrant during the trial. Lyon v. Lyon, 39 Okl. 111, 134 P. 650.

In considering a demurrer to evidence in an action tried to the court, it must consider as true all portions of the evidence tending to prove the allegations of the petition. Wehe v. Mood, 75 P. 476, 68 Kan. 373.

In deciding a demurrer to plaintiffs' evidence, in a court case, the court cannot weigh conflicting evidence or treat the case as submitted by defendant on plaintiffs' showing, but must consider as true all the evidence tending to prove the petition. Farnsworth v. Clarke, 62 P. 655, 62 Kan. 264; Kerr v. Kerr, 101 P. 647, 80 Kan. 83.

[27] Fish v. Sims, 141 P. 980, 42 Okl. 535.

§ 820. —— Ruling and judgment sustaining demurrer

On sustaining a demurrer to the evidence the court should specify the defect in the proof if an essential fact has been omitted and its view of the law if the controlling question be one of law.[28] Such judgment as the pleadings and proof demand should be rendered without submitting any issue to the jury, since the effect of the demurrer is to refer to the court the application of the law to the admitted facts.[29]

Where the court sustains a demurrer to the evidence, it may properly withdraw the case from the jury and render such judgment for demurrant as the pleadings and proof may demand.[30]

§ 821. —— Form

DEMURRER TO EVIDENCE (ORAL)

And now comes the defendant and demurs to the evidence introduced on behalf of the plaintiff, for the reason that the matters and facts shown in evidence by said plaintiff are not sufficient in law to maintain the issue on the part of the plaintiff, and are insufficient to support a cause of action in favor of plaintiff and against the defendant, and that the defendant is not bound by law to answer the same.

§ 822. Direction of verdict

It is error for the trial court, of its own motion, to direct a verdict for the plaintiff before the defendant has rested his case.[31] A case must be clear and certain to sustain a direction of the verdict.[32] It is the duty of the court in directing a verdict to lay out of consideration incompetent evidence received over objection.[33]

The question presented on a motion to direct a verdict is whether, admitting the truth of all the evidence in favor of the party against whom the motion is directed, and the reasonable inferences

[28] Holmes v. Culver, 133 P. 164, 89 Kan. 698.
[29] Courtney v. Gibson, 52 Okl. 769, 153 P. 677.
[30] Terry v. Haynes, 60 Okl. 34, 158 P. 1195.
[31] Williamson v. Holloway (Okl.) 172 P. 44.
[32] Damerson v. McClaren, 116 P. 792, 29 Okl. 340.
[33] Hathaway v. Hoffman, 53 Okl. 72, 153 P. 184; Great Western Coal & Coke Co. v. McMahan, 143 P. 23, 43 Okl. 429; Clinton Nat. Bank v. McKennon, 110 P. 649, 26 Okl. 835; Offutt v. Wagoner, 30 Okl. 458, 120 P. 1018.

and conclusions, there is enough competent evidence to sustain verdict.[34]

Where the evidence is conflicting, all facts and inferences in conflict with the evidence against which the action is to be taken must

[34] Gwinnup v. Walton Trust Co. (Okl.) 172 P. 936; Bowles v. Biffles, 50 Okl. 587, 151 P. 193; Supreme Tribe of Ben Hur v. Owens, 50 Okl. 629, 151 P. 198, L. R. A. 1916A, 979; Shields v. Smith, 50 Okl. 548, 151 P. 207; Wichita Falls & N. W. Ry. Co. v. D. Cawley Co. (Okl.) 172 P. 70; Chickasha Inv. Co. v. Phillips, 58 Okl. 760, 161 P. 223; Homeland Realty Co. v. Robison, 136 P. 585, 39 Okl. 591; Jones v. First State Bank of Bristow, 136 P. 737, 39 Okl. 784; Moore v. First Nat. Bank of Iowa City, 121 P. 626, 30 Okl. 623; St. Louis & S. F. R. Co. v. Posten, 124 P. 2, 31 Okl. 821; T. S. Reed Grocery Co. v. Miller, 128 P. 271, 36 Okl. 134.

In ruling on motion for directed verdict, all evidence unfavorable to the party against whom the verdict is sought, as well as incompetent evidence, must be disregarded. Sartain v. Walker, 60 Okl. 258, 159 P. 1096; Buckeye Engine Co. v. City of Cherokee, 54 Okl. 509, 153 P. 1166; Booker Tobacco Co. v. Walker, 38 Okl. 47, 131 P. 537; Frick-Reid Supply Co. v. Hunter, 47 Okl. 151, 148 P. 83; Bank of Commerce of Ralston v. Gaskill, 44 Okl. 728, 145 P. 1131; Frisco Lumber Co. v. Thomas, 142 P. 310, 42 Okl. 670; Duncan Cotton Oil Co. v. Cox, 139 P. 270, 41 Okl. 633; Continental Ins. Co. v. Chance, 48 Okl. 324, 150 P. 114; Phinnie v. Atkinson (Okl.) 177 P. 111; Oklahoma Automobile Co. v. Goulding (Okl.) 176 P. 400; Smith v. Hutchison Box Board & Paper Co., 101 Kan. 274, 166 P. 484; Kali Inla Coal Co. v. Ghinelli, 55 Okl. 289, 155 P. 606; Stothard v. Junior Coal & Mining Co., 160 P. 213, 98 Kan. 756; Case v. Posey, 55 Okl. 163, 154 P. 1165; Haddock v. Sticelber & Mong (Okl.) 165 P. 1138; Fox v. Campbell, 30 P. 479, 49 Kan. 331; Fidelity Mut. Life Ins. Co. v. Stegall, 111 P. 389, 27 Okl. 151; Chestnutt-Gibbons Grocer Co. v. Consumers' Fruit Co., 44 Okl. 318, 144 P. 591; Hanna v. Mosher, 98 P. 358, 22 Okl. 501; St. Louis & S. F. Ry. Co. v. Clampitt, 55 Okl. 686, 154 P. 40; Abbott v. Dingus, 44 Okl. 567, 145 P. 365; First State Bank of Addington v. Lattimer, 48 Okl. 104, 149 P. 1099; Kinney v. Grooms, 63 Okl. 164, 163 P. 531; Gregory v. Harper, 51 Okl. 419, 152 P. 70.

In an action for services rendered by attorneys under a written contract, where defendants alleged a failure of consideration, and that the contract had been procured by false representations, and introduced evidence to sustain their pleas, it was error to instruct to find for plaintiff. Conner v. Apple & Franklin, 141 P. 424, 42 Okl. 292.

Where plaintiff in an action against an officer for an illegal attachment made a prima facie showing of ownership and right of possession of the property attached as that of another, and the attachment under which the officer justified was held void, it is error to direct a verdict for the officer. Hagar v. Haas, 71 P. 822, 66 Kan. 333.

In an action on a note, held, on the evidence, that directed verdict for plaintiff against all of the defendants was error; there being some evidence to sustain defense of certain of them. Phelps v. Womack (Okl.) 167 P. 478.

Under the evidence in a wife's action against her husband, *held*, that plaintiff was not entitled to a directed verdict for money expended by her in dis-

be eliminated from consideration, leaving that evidence only which is favorable to the party against whom the motion is directed.[35]

It is error to direct a verdict where there is a controverted question of material fact,[36] or any theory of the case under which the

charging her husband's debt and purchasing property for him; the case being for the jury. Sodowsky v. Sodowsky, 51 Okl. 689, 152 P. 390.

Where an Indian minor died in October, 1908, leaving a father and mother surviving, and in 1910 the mother and sister gave plaintiff the lease on which he relied, and there was no evidence of the father's death, an instruction to find for plaintiff was erroneous. Aldridge v. Whitten, 56 Okl. 694, 156 P. 667.

Where, in a pledgee's action against an innocent purchaser from the pledgor, there was evidence that pledgor obtained possession by larceny from the pledgee, it was error to direct a verdict against the pledgee. State Nat. Bank of Shawnee v. McMahan, 45 Okl. 585, 146 P. 1.

Counterclaim.—Where a counterclaim states a good cause of action against plaintiff, though not a proper counterclaim in the action, and plaintiff alleges an affirmative defense, but offers no evidence to support it, a directed verdict for plaintiff on the issues joined is error. Brisley v. Mahaffey, 64 Okl. 319, 167 P. 984.

[35] Baker v. Nichols & Shepard Co., 65 P. 100, 10 Okl. 685; Harris v. Missouri, K. & T. Ry. Co., 103 P. 758, 24 Okl. 341, 24 L. R. A. (N. S.) 858; Solts v. Southwestern Cotton Oil Co., 115 P. 776, 28 Okl. 706; Chicago, R. I. & P. Ry. Co. v. McCulley, 30 Okl. 178, 120 P. 279; Cooper v. Flesner, 103 P. 1016, 24 Okl. 47, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29.

On a motion to direct a verdict only the evidence favorable to the opposing party should be considered. Ferris v. Holiman, 78 Okl. 251, 190 P. 409.

[36] Terry v. Gravitt, 56 Okl. 769, 156 P. 633; Johnson v. Rudsisill, 51 Okl. 480, 152 P. 93; Chicago, R. I. & P. Ry. Co. v. Brown, 55 Okl. 173, 154 P. 1161; Burke v. Smith, 57 Okl. 196, 157 P. 51; Phœnix Ins. Co. of Hartford v. Newell, 60 Okl. 207, 159 P. 1127; Modern Brotherhood of America v. Beshara, 142 P. 1014, 42 Okl. 684; Hogan v. Milburn, 44 Okl. 641, 146 P. 5; Brown & Bridgeman v. Western Casket Co., 30 Okl. 144, 120 P. 1001; Wade v. Sumner, 30 Okl. 784, 120 P. 1011; Schaefer v. Arkansas Valley Interurban Ry. Co., 104 Kan. 740, 181 P. 118; Fulsom-Morris Coal & Mining Co. v. Mitchell, 132 P. 1103, 37 Okl. 575; Gamble v. Riley, 39 Okl. 363, 135 P. 390; Young v. Irwin, 79 P. 678, 70 Kan. 796; Kelley v. Ryus, 29 P. 144, 48 Kan. 120.

Where there is any evidence reasonably tending to establish plaintiff's claim, it is error to direct a verdict for defendant. Scott v. Moore, 52 Okl. 200, 152 P. 823.

Where there was evidence fairly tending to support defendants' contention, it was error to direct a verdict for plaintiff. Citizens' State Bank of Grainfield v. Houser, 148 P. 740, 95 Kan. 351.

It is error to direct a verdict when there is a disputed question of fact touching the amount which plaintiff should recover. Brown v. Baird, 48 P. 180, 5 Okl. 133.

Where the evidence is conflicting, and such that the jury might reasonably find for plaintiff a less sum than directed, it is error to direct a verdict for plaintiff for a specific sum. Miller v. Oklahoma State Bank of Altus, 53 Okl. 616, 157 P. 767.

In personal injury case, where amount of damage was not precisely deter-

opposite party could recover.[37] In other words where the evidence clearly shows plaintiff is entitled to recover, and the only dispute is as to immaterial issues, it is not error to direct a verdict, and where the evidence is undisputed on all the issues necessary for plaintiff's recovery, the court should instruct to find for plaintiff, though there may be a dispute in the evidence as to other immaterial issues.[38] However, where evidence on certain issues clearly establishes plaintiff's right to recover, verdict may be directed for plaintiff notwithstanding other conflicts.[39]

A verdict should be directed only when the facts are such that all reasonable men must draw the same conclusion from them,[40] and

mined, it was not error for court to overrule defendant's motion for instructed verdict for plaintiff in given sum. Bartlesville Zinc Co. v. James (Okl.) 166 P. 1054.

Refusal to direct a verdict for a street car passenger injured in attempting to alight held not error, where the evidence was conflicting as to negligence and contributory negligence. Christian v. Union Traction Co., 154 P. 271, 97 Kan. 46.

Where the evidence as to every issue of fact was conflicting, court under Rev. Laws 1910, § 4993, cannot direct verdict. Abraham v. Southwestern Cotton Oil Co. (Okl.) 169 P. 618.

In action for compensation for procuring exchange of land, where question of condition of agreement between the principal and brokers was controverted, both in pleadings and in testimony, direction of verdict for plaintiffs was error. Campbell v. Thomas, 56 Okl. 779, 156 P. 647.

[37] Sovereign Camp, Woodmen of the World, v. Welch, 83 P. 547, 16 Okl. 188.

Where the evidence was sufficient to support a verdict for plaintiff, the court properly refused to withdraw the case and render judgment and instruct for defendant. City of Ardmore v. Fowler, 54 Okl. 77, 153 P. 1117.

Where the evidence of defendant reasonably tends to support his answer and cross-petition, it is error to instruct a verdict for plaintiff. Fakler v. Summer Mercantile Co., 55 Okl. 264, 155 P. 559.

[38] Choctaw, O. & G. R. Co. v. Garrison, 90 P. 730, 18 Okl. 461.

[39] Dickerson v. Incorporated Town of Eldoraro, 64 Okl. 142, 166 P. 708.

Where plaintiff under the pleadings is entitled to recover unless certain affirmative defenses are sustained and where no evidence was produced reasonably tending to support such defenses, a verdict should be directed for plaintiff. Conwill v. Eldridge (Okl.) 177 P. 79; Frank H. Harrah & Co. v. First Nat. Bank of Tonkawa, 26 Okl. 620, 110 P. 725; Offutt v. Wagoner, 30 Okl. 458, 120 P. 1018; Fitzpatrick v. Nations, 30 Okl. 462, 120 P. 1020.

[40] Continental Casualty Co. v. Owen, 38 Okl. 107, 131 P. 1084; Campbell v. Thomas, 56 Okl. 779, 156 P. 647.

The court may direct a verdict only where the evidence is undisputed or such that the court would set aside a verdict in opposition to it. Moore v. First Nat. Bank of Iowa City, 121 P. 626, 30 Okl. 623.

Where the evidence of plaintiff was sufficient to support his action, and

not when it is necessary to weigh the evidence to determine where the preponderance lies.[41] On the other hand where the facts are undisputed or of such conclusive character that the court in its discretion would be compelled to set aside a verdict returned in opposition thereto, a verdict may be directed.[42]

there was no substantial evidence for defendant, it was error to refuse to instruct to find a verdict for plaintiff. Hussey v. Blaylock, 38 Okl. 204, 132 P. 821.

A verdict cannot be peremptorily instructed against a party where the evidence would sustain one in his favor. Jones v. Citizens' State Bank, 39 Okl. 393, 135 P. 373.

Where the evidence reasonably tends to establish the truth of the allegations of a petition stating a cause of action, it is error to instruct a verdict for defendant. Stewart v. Lafayette, 55 Okl. 411, 153 P. 847.

Where there is any evidence tending reasonably to sustain the petition, verdict should not be directed, the jury being the sole judges of the facts and inferences to be drawn therefrom. Midland Valley R. Co. v. Rippe, 61 Okl. 314, 161 P. 233.

Where evidence in a shipper's action for damages to stock does not show negligence by carrier refusal of peremptory instruction for defendant held error. St. Louis & S. F. R. Co. v. Waggoner, 52 Okl. 1, 152 P. 448.

[41] Freeman-Sipes Co. v. Henson, 110 P. 909, 26 Okl. 799; Lower v. Shorthill, 103 Kan. 534, 176 P. 107; National Council of Knights and Ladies of Security v. Fowler (Okl.) 168 P. 914.

Evidence in an action for breach of a building contract and for compensation for extra work held to reasonably sustain the allegations of plaintiff's petition and render erroneous the direction of a verdict for defendant. Stewart v. Lafayette, 55 Okl. 411, 153 P. 847.

[42] Sartain v. Walker, 60 Okl. 258, 159 P. 1096; Ewing v. United States, 89 P. 593, 11 Ariz. 1; Hanenkratt v. Hamil, 61 P. 1050, 10 Okl. 219; Neeley v. Southwestern Cotton Seed Oil Co., 75 P. 537, 13 Okl. 356, 64 L. R. A. 145; Guss v. Federal Trust Co., 91 P. 1045, 19 Okl. 138; Murphy v. Cobb, 5 Colo. 281; Denver Jobbers' Ass'n v. Rumsey, 71 P. 1001, 18 Colo. App. 320; Haner v. Northern Pac. Ry. Co., 62 P. 1028, 7 Idaho, 305; Barr v. Irey, 45 P. 111, 3 Kan. App. 240; St. Louis & S. F. R. Co. v. Bloom, 39 Okl. 78, 134 P. 432; Vinson v. Los Angeles Pac. R. Co., 82 P. 53, 147 Cal. 479; Sanders v. Chicago, R. I. & P. Ry. Co., 61 P. 1075, 10 Okl. 325; Conklin v. Yates, 83 P. 910, 16 Okl. 266; Creagh v. Equitable Life Assur. Soc., 52 P. 526, 19 Wash. 108; Chicago, R. I. & P. Ry. Co. v. McCulley, 30 Okl. 178, 120 P. 279.

The direction of a verdict for defendants held not error, where there was no evidence, tending to support plaintiff's cause of action. Stroud v. Elliott, 45 Okl. 447, 145 P. 804.

Where plaintiff's evidence made out a case, and defendants introduced no evidence in rebuttal, the court properly instructed a verdict for plaintiff. Moore v. Leigh-Head & Co., 48 Okl. 228, 149 P. 1129.

Where the evidence was insufficient to sustain a verdict for plaintiff, a verdict was properly directed for defendant. Flamm v. Wineland, 139 P. 961, 41 Okl. 688.

A peremptory instruction may and should be given, when the evidence in

Where there is no competent testimony offered sustaining averments of plaintiff's petition, it is not error to direct verdict for defendant.[43]

favor of one of the parties is uncontradicted. Smoot & Abbott v. W. L. Moody & Co., 125 P. 1134, 34 Okl. 522; Eminent Household of Columbian Woodmen v. Prater, 133 P. 48, 37 Okl. 568.

Where plaintiff offers no evidence even reasonably tending to support his allegations, it is not error to direct a verdict for defendants. Burris v. Leet, 51 Okl. 741, 152 P. 352.

[43] Grand Lodge K. P. of North America, etc., v. Farmers' & Merchants' Bank of Boley, 64 Okl. 225, 166 P. 1080.

Where the evidence for plaintiff is sufficient to prove his cause of action, and there is no substantial evidence for defendant, it is not error to direct a verdict for plaintiff. Cockrell v. Schmitt, 94 P. 521, 20 Okl. 207, 129 Am. St. Rep. 737.

Where the only defense is the statute of limitations, and the undisputed evidence shows that plaintiff's cause of action is not barred by the statute, it is error to refuse a peremptory instruction for plaintiff. Fidelity & Deposit Co. v. Sheahan, 133 P. 228, 37 Okl. 702, 47 L. R. A. (N. S.) 309.

Where the petition, in a widow's action for death of her husband, alleged that no administrator had been appointed and there was no proof thereof, it was error to refuse a peremptory instruction for defendant. Frederick Cotton Oil & Mfg. Co. v. Clay, 50 Okl. 123, 150 P. 451.

Where demurrer to plaintiff's evidence was properly overruled and defendant failed to introduce new evidence, a verdict was properly directed for plaintiff. Kilgore v. Rowland (Okl.) 172 P. 43.

Where the evidence introduced by plaintiff fails to support the allegations of the bill of particulars, it is the duty of the court, on motion, to instruct the jury to return a verdict for defendant. Barr v. Irey, 45 P. 111, 3 Kan. App. 240.

In a suit for the price of a car of flour, where there was a plea of payment and a cross-action in damages alleging that the flour was defective, and its use injurious to defendant in his business as a baker, where the evidence proved payment, it was error to refuse to instruct to find for defendant on his plea of payment, and that nothing remained to consider except the issues on his cross-petition. Bales v. Northwestern Consol. Milling Co., 96 P. 559, 21 Okl. 421.

It is not error to instruct the jury to return a verdict for defendant, where the action is founded on a specific agreement, and plaintiff's evidence shows that its performance had by consent of both parties been waived and a different agreement had been made. Peckinpaugh v. Lamb, 79 P. 673, 70 Kan. 799.

Where plaintiff has clearly made out his case, and there is no contrary evidence, it is proper for the court to direct a verdict in his favor. Hillis v. First Nat. Bank, 38 P. 565, 54 Kan. 421.

Where plaintiff sues to recover possession of real estate as his homestead, but on the trial offered no proof to sustain such claim, it is not error to direct a verdict against him. Kelley v. Reynolds, 128 P. 116, 35 Okl. 37.

Where, in a purchaser's suit to recover the purchase money paid, it appeared that the contract provided that the money should be returned upon a failure to do certain things, and the undisputed evidence showed such failure,

Where the evidence on behalf of plaintiff is sufficient to prove his cause of action, and there is no substantial evidence offered by

a directed verdict for plaintiff was proper. Farm Land Mortgage Co. v. Wilde, 136 P. 1078, 41 Okl. 45.

Where, in an action for legal services, plaintiffs' testimony showed that two defendants had paid their share of the fee, a verdict was properly directed for such defendants. Kappler v. Storm, 54 Okl. 493, 153 P. 1142.

Where the payment of a sum certain is a condition precedent to a right to surrender a lease, and on a suit for rent a prior surrender is pleaded, but there is no evidence that said sum certain was ever paid or tendered, it was not error to direct a verdict for plaintiff. Burress v. Diem, 101 P. 1116, 23 Okl. 776.

Where evidence fails to show malice in instituting proceedings and absence of probable cause, it is the duty of the court, on request, to direct a verdict for defendant. Jones Leather Co. v. Woody (Okl.) 169 P. 878.

Where the undisputed evidence showed that the purchaser was in default and had been for some time before the vendor's action in ejectment, and where no defense was offered, a directed verdict for the vendor was proper. Lonsdale v. Reinhard (Okl.) 176 P. 924.

In action involving title to realty where uncontradicted evidence shows the legal and equitable title in plaintiffs and defendant offers no evidence to show a superior title in himself or any defense, it is not error to instruct a verdict for plaintiff. Longest v. Langford (Okl.) 172 P. 927.

Where plaintiff's evidence is uncontradicted, and not inherently improbable, and is sufficient to prove its case, and defendant offers no evidence, it is not error to instruct for plaintiff. Hamilton v. Blakeney (Okl.) 165 P. 141.

Direction of verdict in an action on a verified account held not error, where defendant offered no evidence controverting plaintiff's right to recover. N. S. Sherman Mach. & Iron Works v. R. D. Cole Mfg. Co., 51 Okl. 353, 151 P. 1181.

Bills and notes.—Where two parties are jointly sued on a note and on an account, and the evidence shows that both signed the note, but there is no evidence of liability of one party on the account, the court should instruct that such party is not liable. Stuckey v. Irwin, 163 P. 621, 100 Kan. 57.

In action on note for price of land, where there was no proof of rescission or abandonment of contract, verdict was properly directed for plaintiff. Sooter v. Janes, 57 Okl. 368, 157 P. 282.

In an action on a draft by the holder thereof who acquired it for value before maturity without notice against an indorser from whom the draft is obtained by fraud, the knowledge of the facts which would put a prudent man on inquiry is not sufficient to defeat the right to recover, and the court may direct a verdict for the holder where the circumstances are not sufficiently strong for it to be said as a matter of law that bad faith may be reasonably inferred therefrom. Forbes v. First Nat. Bank of Enid, 95 P. 785, 21 Okl. 206.

Under the evidence in an action on a negotiable note, held that the court should have instructed that plaintiff was an innocent purchaser and that the defenses set up were not available. Showalter v. Webb, 141 P. 439, 42 Okl. 297.

Under Rev. Laws 1910, § 4759, where in an action against an indorser who files an unverified answer plaintiff introduces the note in evidence and de-

defendant the court may properly instruct the jury to return a verdict for plaintiff.[44]

fendant offers no testimony, the court may direct a verdict for plaintiff. Horne v. Oklahoma State Bank of Atoka, 139 P. 992, 42 Okl. 37.

Where there is no substantial evidence to authorize a verdict for a defendant, in an action against him on a negotiable note, bought by plaintiff in good faith before maturity, it is not error for the court to direct a verdict for plaintiff for the full amount thereof. McCormick v. Holmes, 21 P. 108, 41 Kan. 265.

On the trial to a jury of a suit on a note, the court has the right to compute the amount of recovery, and direct a verdict, when the state of the evidence justifies it. MacRitchie v. Johnson, 30 P. 477, 49 Kan. 321.

Insurance.—Where the uncontradicted evidence showed, as to the only issue involved, that the insurance policy sued on had been issued and was in effect, it was error to deny a directed verdict for plaintiff. Van Arsdale-Osborne Brokerage Co. v. Wiley, 140 P. 153, 40 Okl. 651.

In an action on a fidelity bond, where the giving of the bond, the defalcation, and the amount thereof were admitted, defendant claiming that the plaintiff had breached the warranties, the burden of proof on this issue being on the defendant, and where the evidence, with all the inferences that the jury would properly gather from it, was insufficient to support a verdict for the defendant, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the plaintiff, providing his case has been properly made out. Southern Surety Co. v. Tyler & Simpson Co., 30 Okl. 116, 120 P. 936.

Where the widow of insured in an action on a policy introduces evidence that the insured made application for a "Standard Life Insurance Policy," and that such policy was delivered to insured, and rests her case, and defendant introduces conclusive proof that the policy was not a standard policy, but a "sub-standard policy," differing in many important particulars from that called for by the application, it is not error to direct a verdict for defendant. Keel v. New York Life Ins. Co., 94 P. 177, 20 Okl. 195.

Where, in an action on a life insurance policy, the only defense was fraud in the procurement of the insurance, and there was no evidence to establish it, it was proper to direct a verdict for plaintiff. Eminent Household of Columbian Woodmen v. Prater, 133 P. 48, 37 Okl. 568.

Where, in an action on a fire policy requiring proofs of loss, there was no evidence that such proofs were furnished a demurrer to the evidence and a motion for an instructed verdict for defendant should have been sustained. Palatine Ins. Co. v. Lynn, 141 P. 1167, 42 Okl. 486.

Where the petition and evidence show a cause of action on a life policy which is incontestable after two years from date of issue, and the only defense is breach of warranties pleaded more than two years after its date, the court should direct a verdict for plaintiff. Mutual Life Ins. Co. of New York v. Buford, 61 Okl. 158, 160 P. 928.

Negligence.—Where the evidence failed to show causal connection between

---

[44] Ketchum v. Wilcox, 48 P. 446, 5 Kan. App. 881; Irwin v. Dole, 52 P. 916, 7 Kan. App. 84; Underwood v. Stack, 46 P. 1031, 15 Wash. 497; Carmack v. Drum, 67 P. 808, 27 Wash. 382.

Where defendant, by his answer and evidence, admits all the allegations of plaintiff's petition, the court may instruct the jury to return a verdict for plaintiff.[45]

When the evidence shows without dispute that the plaintiff is entitled to recover and the defendant elects to stand upon a demurrer to the evidence, it is proper to direct a verdict for the plaintiff.[46]

§ 823. —— Effect of motion

Where an answer denying execution of a note is not verified as required by statute, but plaintiff joins issue thereon by general denial in reply, a motion to direct a verdict for plaintiff after the close of the evidence does not question the sufficiency of the answer.[47]

A motion by each party that a verdict be directed is not a waiver of the right to have the facts passed upon by the jury, or an agreement to submit them to the trial judge if the motion be denied.[48]

the negligence averred and the damages suffered, the court should direct a verdict for defendant. Patterson v. Seals, 51 Okl. 347, 151 P. 591.

Where the evidence does not entirely fail to show negligence by defendant, the court should submit the case to the jury, but where the evidence fails entirely to show negligence, a verdict should be instructed for defendant. New York Plate Glass Ins. Co. v. Katz, 51 Okl. 713, 152 P. 353.

A verdict held properly directed in an action by a miller whose hand was drawn into the hopper of a mill by a coil of wire which he was attempting to remove, in the absence of proof that the presence of the wire was the result of defendant's negligence. Smith v. Acme Milling Co., 34 Okl. 439, 126 P. 190.

In action by widow for wrongful death of husband, where petition alleges that no personal representative has been appointed, and issue is properly raised thereon by answer, and there is no proof of such allegation, it is error to refuse to peremptorily direct verdict for defendant. Chicago, R. I. & P. Ry. Co. v. Brooks, 57 Okl. 163, 156 P. 362.

Where the evidence fails to show causal connection between the negligence alleged and the injuries suffered, the court should on request direct a verdict for the defendant employer. Sallisaw Cotton Oil Co. v. Holland, 56 Okl. 428, 156 P. 174.

Where there is no evidence of negligence or from which negligence might be reasonably inferred, a verdict should be directed for defendant. St. Louis & S. F. R. Co. v. Smith, 137 P. 357, 41 Okl. 314.

[45] Gifford v. Ammer, 54 P. 802, 7 Kan. App. 365.

[46] Watkins v. School Dist. No. 104 of Crawford County, 85 Kan. 760, 118 P. 1069.

[47] Jones v. Citizens' State Bank, 39 Okl. 393, 135 P. 373.

[48] Midland Valley R. Co. v. Lynn, 38 Okl. 695, 135 P. 370; Farmers' Nat.

§ 824. —— Form of motion

MOTION FOR DIRECTED VERDICT (ORAL)

Comes now the plaintiff and moves the court to direct the jury to return a verdict in favor of plaintiff and against the defendant, for the reason that the evidence clearly shows that plaintiff is entitled to recover and that no evidence has been introduced reasonably supporting any defense on behalf of the defendant, and that no material question is put in issue by the evidence.

Bank v. McCall, 25 Okl. 600, 106 Pac. 866, 26 L. R. A. (N. S.) 217; Hogan v. Milburn, 44 Okl. 641, 146 P. 5; Smith v. Hutchison Box Board & Paper Co., 101 Kan. 274, 166 P. 484; Taylor v. Wooden, 30 Okl. 6, 118 P. 372, 36 L. R. A. (N. S.) 1018; Bartlesville Zinc Co. v. James (Okl.) 166 P. 1054.

CHAPTER XIV

WITNESSES

Sections
825–840. Article I.—Procuring attendance and testimony.
841–859. Article II.—Examination of witnesses.
841–852. Division I.—Direct examination.
853–858. Division II.—Cross-examination.
859. Division III.—Redirect examination.
860–874. Article III.—Competency and privilege.
875–888. Article IV.—Credibility and impeachment.

ARTICLE I

PROCURING ATTENDANCE AND TESTIMONY

Sections
825. Taking testimony—Modes.
826. Oath—Interpreter.
827. Subpœna—Issuance.
828. Contents—Duces tecum.
829. Service.
830. Disobedience of—Contempt.
831. Forms.
832. Attachment for nonattendance.
833. Punishment.
834. Requisites of—Form.
835. Prisoners as witnesses.
836. Custody.
837. Attendance.
838. Of adverse party.
839. Witness may demand fees.
840. Refusal to testify—Contempt.

§ 825. Taking testimony—Modes

"The testimony of witnesses is taken in three modes:

"First. By affidavits.

"Second. By deposition.

"Third. By oral examination." [1]

§ 826. Oath—Interpreter

"Before testifying, the witness shall be sworn to testify to the truth, the whole truth, and nothing but the truth. The mode of

[1] Rev. Laws 1910, § 5067.

administering an oath shall be such as is most binding on the conscience of the witness. An interpreter may be sworn to interpret truly, whenever necessary." [2]

§ 827. Subpœna—Issuance

"The clerks of the several courts shall, on application of any person having a cause or any matter pending in the court, issue a subpœna for witnesses, under the seal of the court, inserting all the names required by the applicant in one subpœna, which may be served by the sheriff or any constable of the county, or by the party, or any other person in the manner provided in section 5054. When a subpœna is not served by the sheriff or constable, proof of service shall be shown by affidavit; but no costs of service of the same shall be allowed, except when served by an officer." [3]

§ 828. —— Contents—Duces tecum

"The subpœna shall be directed to the person therein named, requiring him to attend at a particular time and place, to testify as a witness; and it may contain a clause directing the witness to bring with him any book, writing or other thing, under his control, which he is bound by law to produce as evidence." [4]

§ 829. —— Service

"Service of subpœnas for witnesses in civil and criminal actions in the district, superior, county and justice of the peace courts of this state shall be made by the officer, or other person making the service, by either personal service of such subpœna containing the time, place and the name of the court, and the action in which he is required to testify, or by mailing a copy thereof by registered mail, not less than three days before the trial day of the cause upon which said witness is required to attend, and the per-

[2] Rev. Laws 1910, § 5066.

[3] Rev. Laws 1910, § 5051.

[4] Rev. Laws 1910, § 5052.

Where, upon the application of the plaintiff, a subpœna is directed to the defendant in the action, requiring him to attend upon the trial to testify as a witness, and the subpœna requires the witness to bring with him a written memorandum under his control, which is competent evidence on the part of the plaintiffs, and such witness appears, is sworn as a witness, and has the memorandum under his control and in his hands while upon the witness stand, it is error for the court to refuse to make him produce it as evidence in the case. Marsh v. Davis, 6 P. 612, 33 Kan. 326.

son making such service shall make a return thereof showing the manner of service, and if the same be by registered mail, he shall file with such return the registry receipt: Provided, that the person or county attorney issuing the præcipe for a subpœna shall state therein the manner in which the witness or witnesses shall be served, and the officer or person serving such subpœna shall serve the same in the manner directed by the præcipe, and make his return in accordance therewith: Provided, further, that if the præcipe calls for serving such subpœna by registered letter, then the clerk shall serve the same as provided for the serving of jurors." [5]

§ 830. —— Disobedience of—Contempt

"Disobedience of a subpœna, or refusal to be sworn or to answer as a witness, or to subscribe a deposition, when lawfully ordered, may be punished as a contempt of the court or officer by whom his attendance or testimony is required." [6]

§ 831. —— Forms

SUBPŒNA

(Caption.)

To ——— — Greeting:

You are hereby commanded to appear before the ——— court of ——— county, at the court house of said county, at ———, on the ——— day of ———, 19—, at ——— o'clock ——— m., to testify as a witness in the above entitled case pending in said court, on the part of the ——— and not depart without leave of court.

Hereof fail not, under penalty of law.

In witness whereof, I have hereunto set my hand and official seal in the city of ——— this ——— day of ———, 19—.

———, Court Clerk,

(Seal.) By ———, Deputy.

OFFICER'S RETURN

Received this writ this ——— day of ———, 19—, at ——— o'clock, ——— m. ———, 19—, served the same by leaving a copy thereof with the indorsement thereon duly certified to the within named ———, ———, 19—, at the usual place of residence

[5] Sess. Laws 1913, p. 113, § 2, amending Sess. Laws 1910, ch. 51, § 2 (Rev. Laws 1910, § 5054) effective March 20, 1913.

[6] Rev. Laws 1910, § 5057.

of the within named witness ———; by ———, 19—, I cannot find the within named ——— in my county.

———, Sheriff,
By ——— Under Sheriff (Deputy).

RETURN OF SUBPŒNA SERVED BY REGISTERED MAIL

State of Oklahoma, }
County of ———. } ss.:

I hereby certify that on the ——— day of ———, 19—, I served the within subpœna on A. B., by mailing a true and certified copy thereof, with all of the indorsements thereon, by registered mail, addressed to the said A. B., at ———, his usual place of residence, the registry receipt being attached hereto and filed herewith.

———, Court Clerk,
(Seal.) By ———, Deputy.

PRÆCIPE FOR SUBPŒNA—CIVIL

State of Oklahoma, }
——— County. } ss.:

In the District Court of ——— County.

A. B., Plaintiff, }
v. } Præcipe.
C. D., Defendant. }

To the Clerk of Said Court:

You are hereby directed to issue a subpœna for E. F., G. H., and M. N. to appear in said court on the ——— of ———, 19—, at ——— o'clock ——— m., to testify on the part of said plaintiff (or defendant) in the above entitled cause.

Dated this ——— day of ———, 19—.

X. Y., Attorney for Plaintiff (or Defendant).

§ 832. Attachment for nonattendance

"When a witness fails to attend in obedience to a subpœna (except in case of a demand and failure to pay his fees), the court or officer before whom his attendance is required may issue an attachment to the sheriff, coroner or constable of the county, commanding him to arrest and bring the person therein named before the court or officer, at a time and place to be fixed in the attach-

ment, to give his testimony and answer for the contempt. If the attachment be not for immediately bringing the witness before the court or officer, a sum may be fixed in which the witness may give an undertaking, with surety, for his appearance; such sum shall be indorsed on the back of the attachment; and if no sum is so fixed and indorsed, it shall be one hundred dollars. If the witness be not personally served, the court may, by a rule, order him to show cause why an attachment should not issue against him." [7]

§ 833. —— Punishment

"The punishment for the contempt mentioned in the preceding section, shall be as follows: When the witness fails to attend, in obedience to the subpœna (except in case of a demand and failure to pay his fees), the court or officer may fine the witness in a sum not exceeding fifty dollars. In other cases the court or officer may fine the witness in a sum not exceeding fifty dollars, or may imprison him in the county jail, there to remain until he shall submit to be sworn, testify or give his deposition. The fine imposed by the court shall be paid into the county treasury, and that imposed by the officer shall be for the use of the party for whom the witness was subpœnaed. The witness shall, also, be liable to the party injured for any damages occasioned by his failure to attend, or his refusal to be sworn, testify or give his deposition." [8]

A party to a suit may be called as a witness by his adversary, and his disobedience of the summons may be punished in contempt proceedings.[9]

Disobedience of a subpœna is not a direct contempt which may be summarily punished, but is an indirect contempt committed out of the presence of the court, and therefore punishable only by formal accusation, arrest, plea, and trial.[10]

§ 834. —— Requisites of—Form

"Every attachment for the arrest, or order of commitment to prison of a witness by a court or officer, pursuant to this article, must be under the seal of the court or officer, if he have an official

[7] Rev. Laws 1910, § 5058.
[8] Rev. Laws 1910, § 5059.
[9] In re Abbott, 54 P. 319, 7 Okl. 78.
[10] State v. Anders, 68 P. 668, 64 Kan. 742.

seal, and must specify, particularly, the cause of arrest or commitment; and if the commitment be for refusing to answer a question, such question must be stated in the order. Such order of commitment may be directed to the sheriff, coroner or any constable of the county where such witness resides, or may be at the time, and shall be executed by committing him to the jail of such county, and delivering a copy of the order to the jailor." [11]

ATTACHMENT FOR NONATTENDANCE OF WITNESS

(Caption.)

The State of Oklahoma to the Sheriff of ——— County—Greeting:

You are hereby commanded to attach A. D., and bring him forthwith personally before this court, at the city of ———, in said county and state, to answer to this court for certain contempts against this court, in not obeying its writ of subpœna, commanding him to appear on the ——— day of ———, 19—, before the said court, to testify in an action there to be tried between ———, plaintiff, and ———, defendant; and you are further commanded to detain said A. D. in your custody until he shall be discharged by this court; and have you then and there this writ.

Witness the Honorable ——— judge of said court, at ———, on the ——— day of ———, 19—.

———, Court Clerk,

(Seal.) By ———, Deputy.

Allowed this ——— day of ———, 19—.

———, Judge.

§ 835. Prisoners as witnesses

"A person confined in any prison in this State may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned, but in all other cases his examination must be by deposition." [12]

§ 836. —— Custody

"While a prisoner's deposition is being taken, he shall remain in the custody of the officer having him in charge, who shall afford reasonable facilities for the taking of the deposition." [13]

[11] Rev. Laws 1910, § 5061.
[12] Rev. Laws 1910, § 5062.
[13] Rev. Laws 1910, § 5063.

§ 837. Attendance

"A witness shall not be obliged to attend for examination on the trial of a civil action except in the county of his residence, nor to attend to give his deposition out of the county where he resides, or where he may be when the subpœna is served upon him." [14]

§ 838. —— Of adverse party

A party may compel his adversary, either at the trial or by deposition, to testify as a witness in the same manner and subject to the same rules as other witnesses, and by the service of a subpœna may compel the production of any book, writing, or other thing under his control.[15]

§ 839. Witness may demand fees

"A witness may demand his traveling fees and fee for one day's attendance, when the subpœna is served upon him; and if the same be not paid, the witness shall not be obliged to obey the subpœna. The fact of such demand and nonpayment shall be stated in the return." [16]

There is no law making a county liable for the fees of witnesses required to attend before the grand jury, or in criminal causes in any of the courts.[17] A county is not a party to a criminal prosecution, and is not liable for fees of witnesses attending before the grand jury or a court in a criminal case, in the absence of a statute imposing such liability.[18]

In an action to recover for services as a witness, where the defense was that the services were a mere gratuity, with the understanding at the time of performance that they were not to be paid for, and there was evidence tending to establish such a defense, it is error for the court to refuse to instruct the jury as to the principle that no recovery can be had for services gratuitously performed.[19]

"At the commencement of each day after the first day, a witness may demand his fees for that day's attendance, in obedience to a

[14] Rev. Laws 1910, § 5055.
[15] Landon v. Morehead, 126 P. 1027, 34 Okl. 701.
[16] Rev. Laws 1910, § 5056.
[17] Board of Com'rs of Greer County v. Watson, 54 P. 441, 7 Okl. 174.
[18] Id.
[19] Stadel v. Stadel, 20 P. 475, 40 Kan. 646.

subpœna; and if the same be not paid, he shall not be required to remain." [20]

§ 840. Refusal to testify—Contempt

Where a witness persists in attempting to evade examination, it is the court's duty to reprimand him, and, if necessary, punish him for contempt.[21]

ARTICLE II

EXAMINATION OF WITNESSES

DIVISION I.—DIRECT EXAMINATION

Sections
841. Mode of testifying.
842. Questions.
843. Leading questions.
844. Hostile witnesses.
845. Repetition.
846. Interrogation by court.
847. Responsiveness of answer.
848. Aids to explain testimony—Diagrams—Computation.
849. Refreshing memory.
850. Memoranda as evidence.
851. Stenographer's notes.
852. Recalling witnesses.

DIVISION II.—CROSS-EXAMINATION

853. Extent of cross-examination.
854. Limitation to subjects of direct examination.
855. Collateral and irrelevant matters.
856. Character witness.
857. Cross-examination of party.
858. Recalling witness.

DIVISION III.—REDIRECT EXAMINATION

859. Scope and extent.

DIVISION I.—DIRECT EXAMINATION

§ 841. Mode of testifying

It is within the discretion of the court to permit a witness to testify in a narrative form, and not in answer to questions.[22]

[20] Rev. Laws 1910, § 5065.

[21] Ostendorf v. State, 128 P. 143, 8 Okl. Cr. 360.

Where a witness persists in a refusal to answer a question, he may be pun-

[22] Maier v. Randolph, 6 P. 625, 33 Kan. 340.

Testimony is not necessarily incompetent because given in a dramatic and hysterical manner.[23]

Permitting a witness to be led to correct an erroneous omission of the word "not," so as to make his testimony conform to that of all the other witnesses, including the party objecting, is not an abuse of discretion.[24]

§ 842. Questions

A witness may be questioned in his examination in chief as to his residence, occupation, and positions held by him.[25]

Permitting plaintiff to be asked as to conversation between himself and defendant is not error, where the question does not necessarily call for anything that is not competent evidence.[26]

It is error to ask a witness on direct examination if he has heard the testimony of a prior witness as to a material fact, and if such testimony is correct.[27]

§ 843. —— Leading questions

The allowance or exclusion of leading questions is within the discretion of the court.[28] But this discretion must be exercised with care and without abuse.[29]

ished for contempt, as the pertinency of the question asked was for the determination of the court, and not the witness. Hanson v. Sward, 140 P. 100, 92 Kan. 1. Imprisonment may be imposed, not only to punish a witness for contumacy, but to compel him to obey a lawful order, and produce testimony which the court deems necessary. Id.; Ex parte Hanson, 105 P. 694, 80 Kan. 783.

Refusal to answer questions in a criminal proceeding is a criminal contempt, and the punishment therefor is governed by the Criminal Code, and where the statute limits the punishment it must conform to such limitation. Ex parte Gudenoge, 100 P. 39, 2 Okl. Cr. 110. A direct contempt consists of disorderly and insolent behavior during the session of the court and in its immediate view of the unlawful and willful refusal of a person to be sworn as a witness and the refusal to answer a proper question. Id.

[23] Stafford v. Noble, 105 Kan. 219, 182 P. 650.

[24] Smith v. Gillis, 51 Okl. 134, 151 P. 869.

[25] Muskogee Electric Traction Co. v. Rye, 47 Okl. 142, 148 P. 100.

[26] Mullarky v. Manker, 102 Kan. 92, 170 P. 31.

[27] Missouri, K. & T. Ry. Co. v. Lycan, 47 P. 526, 57 Kan. 635.

[28] Ellison v. Beamabia, 46 P. 477, 4 Okl. 347.

Where a witness for the state testified to a scuffle, it was error to exclude as leading a question asking defendant whether a scuffle had preceded the shooting. State v. Alexander, 131 P. 139, 89 Kan. 422.

[29] An objection to a question inquiring of relatrix as to the possibility of a date being other than as to which she had testified held properly sustained;

Where a witness was an illiterate Mexican it was not an abuse of discretion to permit leading questions to be put to him, so that the interpreter might the better render the same into the Mexican language, and the witness might better understand them.[30]

§ 844. —— Hostile witness.

Leading questions must not be asked a witness by the party calling him, unless he appears hostile, when the rule may be relaxed by the court;[31] that is, where a witness is unwilling and hostile to the party calling him, and his answers are evasive, he may be examined in the manner of a cross-examination.[32] The extent to which he may be examined rests generally in the discretion of the court.[33]

§ 845. —— Repetition

Where a question has been asked and answered without objection, it is not error to sustain an objection to practically the same question.[34]

§ 846. —— Interrogation by court

The trial court may in its discretion aid in eliciting material matter suggested by the evidence by interrogating a witness,[35] but in

the question being leading and substantive. State v. Creager, 155 P. 29, 97 Kan. 334.

In a case tried by the district court without a jury on a petition to vacate a judgment, and for a new trial, a question was asked by the counsel of the then defendant, the original plaintiff, of the then defendant himself, who was then testifying as a witness with respect to a matter which was competent to be proved in the case, but the question was to some extent leading, and assumed a certain fact which probably had not yet been proved, and probably should not have been proved; and the answer to the question was with reference to that portion of the question which was proper to be proved. Held, that the court erred in permitting the question to be asked in the form in which it was asked. Fullenwider v. Ewing, 1 P. 300, 30 Kan. 15.

A question asked a witness regarding an alleged dying declaration of decedent, "Didn't he say, 'He murdered me, doctor?'" was leading, and an objection on that ground should have been sustained. Mulkey v. State, 113 P. 532, 5 Okl. Cr. 75.

30 Ellison v. Beannabia, 46 P. 477, 4 Okl. 347.

31 Ostendorf v. State, 128 P. 143, 8 Okl. Cr. 360; Gardner v. State, 115 P. 607, 5 Okl. Cr. 531.

32 State v. Hughes, 56 P. 142, 8 Kan. App. 631.

33 State v. Hamilton, 87 P. 363, 74 Kan. 461.

34 Ferris v. Shandy (Okl.) 174 P. 1060; State v. Sweet, 101 Kan. 746, 168 P. 1112; Hughes v. Ward, 16 P. 810, 38 Kan. 452.

35 De Ford v. Painter, 41 P. 96, 3 Okl. 80, 30 L. R. A. 722.

such a manner as will not tend to prejudice the jury against the rights of the parties,[36] or indicate his opinion as to the merits or the credibility of witnesses.[37]

§ 847. Responsiveness of answer

An answer by the adverse party or by a hostile witness should, on request, be withdrawn from the jury, where it is not responsive to the question.[38] But where no request has been made for such withdrawal, an objection to the question does not justify a reversal.[39]

Where one of parties is an attorney at law and testifies in his own behalf, he is governed by the same rules as other witnesses, and should not be allowed to make argument while testifying.[40]

§ 848. Aids to explain testimony—Diagrams—Computation

It is not error to permit the owner of land, while testifying as a witness in his own behalf, to introduce in evidence a diagram drawn by himself showing the location of his various improvements on the land, his house, barn, orchard, meadow, cultivated land, etc., and the relative location of the railroad over the land with respect to these improvements, and to permit the witness to refer to the diagram in his testimony.[41] Nor is it error to permit a competent witness to compute, in the presence of the court and jury, the aggregate amount of an inventory, introduced to show the amount of the loss, and state the result to the jury.[42]

§ 849. Refreshing memory

A witness who makes memoranda of events at the time of their occurrence, is permitted to refer, when under examination, to such memoranda, to refresh his memory.[43] He may be permitted to refresh his memory from a writing or memorandum made by himself

[36] Howard v. Territory, 79 P. 773, 15 Okl. 199; Miller v. Territory, 85 P. 239, 15 Okl. 422, judgment reversed 149 F. 330, 79 C. C. A. 268, 9 Ann. Cas. 389; Going v. Shelton (Okl.) 176 P. 962; Clark v. Phelps, 10 P. 107, 35 Kan. 43; State v. Keehn, 118 P. 851, 85 Kan. 765.

[37] Smith v. State, 12 Okl. Cr. 513, 159 P. 941.

[38] Chicago, K. & W. R. Co. v. Muller, 25 P. 210, 45 Kan. 85.

[39] Chicago, K. & W. R. Co. v. Woodward, 27 P. 836, 47 Kan. 191.

[40] Bilby v. Owen (Okl.) 181 P. 724.

[41] Chicago, K. & W. R. Co. v. Dill, 21 P. 778, 41 Kan. 736.

[42] German Ins. Co. of Freeport, Ill., v. Amsbaugh, 55 P. 481, 8 Kan. App. 197.

[43] Sanders v. Wakefield, 20 P. 518, 41 Kan. 11.

shortly after the occurrence of the fact to which it relates; but it is only when the memory needs assistance that resort may be had to these aids, and, if the witness has an independent recollection of the facts inquired about, there is no necessity nor propriety in his inspecting any writing or memorandum.[44]

It is immaterial whether the memoranda is in such form as to be competent as independent evidence or not, providing he, after referring to same, has any independent recollection of the subject-matter.[45] He may refresh his recollection from a memorandum made under his direction;[46] that is, written memoranda of events pertinent to the issues in a cause, made at the time of their taking place, when shown by the oath of the person making them that they were correct when made, may be referred to, to refresh the memory of a witness, and may be introduced in evidence, not as independent proof, but to supply the details of what the witness has sworn,[47] even though made by another.[48]

An attorney, in stating what a witness, since deceased, testified

[44] State v. Baldwin, 36 Kan. 1, 12 Pac. 318.

In a shipper's action for damages to a shipment of cattle, the report of a commission company was competent as a memorandum to refresh plaintiff's memory touching sums realized for the dead and crippled cattle for which suit was brought. Cockrill v. Missouri, K. & T. Ry. Co., 136 P. 322, 90 Kan. 650.

In a prosecution for larceny of a state warrant and for obtaining a state warrant by false representations as to the amount of printing done for the state, held that, though a witness retained no independent recollection of the amount of printing done, he could refresh his memory by consulting entries in defendant's books on the witness stand. State v. Rule, 11 Okl. Cr. 237, 144 P. 807.

[45] McNeely v. Duff, 31 P. 1061, 50 Kan. 488.

[46] Wilkes v. S. V. Clark Coal & Grain Co., 148 P. 768, 95 Kan. 493.

Where, during the trial, an officer who has taken goods on legal process is testifying, it is not error to permit him to refresh his memory from a copy of his return of the process, made by a typewriter in his presence and under his direction. Flohr v. Territory, 78 P. 565, 14 Okl. 477.

[47] First Nat. Bank v. Yeoman, 78 P. 388, 14 Okl. 626.

A witness who stepped land and made memoranda of its dimensions in steps at the time may refresh his memory as to the number of steps by reference to such memoranda. Elwell v. Purcell, 140 P. 412, 42 Okl. 1.

[48] Where it appears from the evidence that witnesses have an independent recollection as to the transactions connected with the shipment and sale of a lot of hogs, they may refresh their memory as to the number of hogs, and selling price, by referring to a memorandum made by another. Western Union Tel. Co. v. Collins, 53 P. 74, 7 Kan. App. 97.

to at a former trial, may refresh his recollection from a bill of exceptions, or may read from it, if he knew, when he drew it, that it stated the testimony of the deceased witness.[49]

Any writing used by a witness to refresh his memory must be produced and shown to the adverse party, if he requires it, who may cross-examine the witness thereon.[50]

§ 850. Memoranda as evidence

A memorandum made under a witness' directions may be received in evidence.[51]

Where it is not shown that the memoranda were made contemporaneously with the happening of the events which they describe, and that the events were correctly recorded, it is error to admit them in evidence.[52]

Where voluminous memoranda as to the number and kinds of trees planted under a contract with a city had been made by witnesses, who at the trial had no independent recollection of the facts, but could testify that they knew of the truth and accuracy of the statements in the memoranda when they were written, and that they were correctly written, both the testimony of the witnesses and the memoranda were properly received in evidence.[53]

§ 851. Stenographer's notes

The rule requiring the best evidence to be produced is not violated by permitting the official court stenographer to read from his notes the testimony of a witness in a former trial, taken and recorded by him at the time, and sworn to by him to be correct, even though he has no independent recollection of such testimony, and cannot refresh his memory from such notes.[54]

A stenographer who took testimony of a witness at a former trial may refresh his memory from the longhand transcript of the evi-

[49] Solomon R. Co. v. Jones, 8 P. 730, 34 Kan. 443.

[50] Atchison, T. & S. F. R. Co. v. Hays, 54 P. 322, 8 Kan. App. 545.

[51] Wilkes v. S. V. Clark Coal & Grain Co., 95 Kan. 493, 148 P. 768.

Book entries held admissible as a means of verifying what a witness stated from memory as to the transactions shown by the entries. State v. Rule, 11 Okl. Cr. 237, 144 P. 807.

[52] First Nat. Bank of Enid v. Yeoman, 78 P. 388, 14 Okl. 626.

[53] City of Garden City v. Heller, 60 P. 1060, 61 Kan. 767.

[54] Cutler v. Territory, 56 P. 861, 8 Okl. 101.

dence taken.[55] Where the stenographer's shorthand notes of testimony have been transcribed in longhand, and at the time of so doing he made duplicate carbon copies of the same, such duplicate copies are not copies in the sense in which the word is ordinarily used, and the use of such carbon by a stenographer testifying from which to refresh his memory is not error.[56]

§ 852. Recalling witnesses

The refusal to permit a witness who has testified for defendant, and who, after the rebuttal testimony of plaintiff has been introduced, is recalled by defendant for further redirect examination to testify in respect to a matter concerning which he has been examined when first on the witness stand, is not error.[57]

Division II.—Cross-Examination

§ 853. Extent of cross-examination

The latitude on cross-examination must depend on the circumstances of the case, and rests largely in the discretion of the trial court.[58] However, it is the duty of the trial court to confine the cross-examination of witnesses to proper channels.[59]

[55] Harmon v. Territory, 79 P. 765, 15 Okl. 147.

[56] Id.

[57] St. Louis & S. F. Ry. Co. v. Vance, 58 P. 233, 9 Kan. App. 565.

[58] State v. Ross, 94 P. 270, 77 Kan. 341; Hamilton v. Miller, 26 P. 1030, 46 Kan. 486; Cobb v. Oklahoma Pub. Co., 140 P. 1079, 42 Okl. 314; Patton v. Union Traction Co., 101 Kan. 388, 167 P. 1041; State v. Allen, 160 P. 795, 98 Kan. 778, 99 Kan. 187.

That considerable latitude was allowed in the cross-examination of a witness did not constitute error. State v. Patterson, 157 P. 437, 98 Kan. 197.

Illustrations.—Where, in an agent's action for compensation and for an ac-

[59] Scott v. State, 13 Okl. Cr. 225, 163 P. 553.

Where, on trial for selling intoxicating liquor, a witness for the state testified that he bought beer from the defendant, which he drank, he cannot, on cross-examination, be asked to drink from a bottle of strange liquor proffered him, and state if it is the same as that he had previously purchased. State v. Snyder, 74 P. 231, 67 Kan. 801.

An objection to cross-examination which required a party to compare certain gin weights of cotton with compress weights thereof and to make mathematical calculation and state result was properly sustained. Sapulpa Co. v. Kimball & Reading, 59 Okl. 93, 158 P. 935.

Refusal to permit further cross-examination of a witness held not an abuse of discretion, where defendant's counsel did not state that the facts sought had come to his knowledge since he announced that he did not desire to cross-examine further. State v. Arch, 157 P. 1198, 98 Kan. 404.

On cross-examination, a witness may be asked questions to test his knowledge as to the matters concerning which he has testified, or to elicit evidence favorable to the cross-examiner, if the ques-

counting, his testimony was not clear, it was error to refuse to permit him to be cross-examined as to how much he had paid to defendant's former manager who had left the state and to whom plaintiff testified on direct examination he had paid over certain collections. Weleetka Light & Water Co. v. Burleson, 142 P. 1029, 42 Okl. 748. On cross-examination of a plaintiff claiming a salary for personal services, it is proper to direct questions against the claim and manner and form of performance of such services, and against faithfulness in such performance. Id.

Where defendant's wife testified that he was at home with his family at the time of the larceny but left early the following morning, it was competent for the state to ask on cross-examination how long it was after the commission of the crime before defendant returned. Jones v. State, 137 P. 121, 10 Okl. Cr. 216, affirming judgment on rehearing 136 P. 182, 10 Okl. Cr. 216.

Where a witness testified on direct examination that he was acting at the instance of an attorney when he procured a statement from plaintiff as to his injuries, it was proper to elicit from him on cross-examination that the attorney represented an insurance company. Reynolds v. New Century Min. Co., 133 P. 844, 90 Kan. 208.

Where a witness of the state testifies to a transaction, the defendant on cross-examination may bring out all the facts in connection with such transaction within the knowledge of the witness. Rogers v. State, 127 P. 365, 8 Okl. Cr. 226. Where the state has placed a witness on the stand, and the issue is self-defense, defendant can ask witness on cross-examination as to whether deceased drank any intoxicating liquor while he was with him. Id. Where a witness testified to a transaction or a part of it, the opposing party may on cross-examination bring out anything that happened during the time covered by the testimony. Id.

A question inquiring of relatrix if she had not testified a certain way in another court held proper cross-examination. State v. Creager, 155 P. 29, 97 Kan. 334.

In an action against a railroad for personal injury, where the issue was whether the train dispatcher was negligent in giving an order to a conductor to meet another train composed of two sections, and to establish the negligence of the train dispatcher the conductor testified that, until he saw the second section of the train he had orders to meet, he had no knowledge that said section was on the road, held, that on cross-examination it was competent to ask him if he understood the signals carried by the first section; if, by those signals, he knew there was a second section following, which had the right to the road; and if he had the right to leave the station in the face of the signals carried by the first section. Hannibal & St. J. R. Co. v. Kanaley, 17 P. 324, 39 Kan. 1.

In an action against a sheriff for the value of goods seized by him under an attachment and sold, plaintiff claimed to have bought the goods from the debtor prior to the levy of attachment, and to have paid for the same by the execution and delivery to the insolvent debtor of two notes, signed by himself, one for $1,100 and the other for $1,200, and that the $1,100 note was de-

tions are not otherwise objectionable.[60] He may be asked any question which reasonably tends to explain his testimony in chief,[61] but should not be asked questions which are full of insulting insinuations and intimations that he is guilty of crime.[62]

Great latitude should be allowed on the cross-examination of a witness where it is claimed that his testimony is affected by the friendship or enmity he has toward either party in the action; and, as a general rule, the party against whom a witness is produced

livered to parties who had indorsed for the insolvent debtors as collateral security for such indorsements. Held that it is error for the trial court, when one of such persons was on the witness stand, to refuse to permit the attorney for the sheriff to ask him if the note was paid, and how paid, and by whom paid; and it is also error to refuse to make the purchaser answer questions as to whether or not there was also an understanding between him and the insolvent debtor that, if he lost this suit, he would not have to pay the $1,200 note, and as to whether the $1,200 note was paid, or was to be paid. De Ford v. Orvis, 21 P. 1105, 42 Kan. 302.

In an action attacking a bill of sale as fraudulent, where a witness testifies for the parties upholding the bill that about the time it was made executions were issued against him, that he was in possession of the property, and that his attorney came to his place, and drew up the bill, it is competent on cross-examination to ask him if the bill was not given simply as security. McCluskey v. Cubbison, 57 P. 496, 8 Kan. App. 857. It is proper to ask such witness whether he and the attorney had made an inventory of the goods, as showing whether the transaction was unusual or not. Id.

In replevin, defendant admitted receiving certain money at the time a mortgage was executed by him, but contended that no part thereof was intended to be secured by such mortgage. Held that on cross-examination of plaintiff, defendant could bring out facts tending to show that independent of the mortgage, moneys loaned to defendant were paid by him to plaintiff. First Bank of Hoffman v. Harrison, 116 P. 789, 29 Okl. 302.

In a homicide case, where accused offered a witness who testified that he had heard decedent make threats against accused, and that witness communicated such threats to accused before the difficulty occurred, the state on cross-examination could ask such witness what accused said, if anything, when he was informed of the alleged threats. Smith v. State, 114 P. 350, 5 Okl. Cr. 282.

Where attachment affidavit states grounds which are conceded to be untrue, and affiant is witness for plaintiff, it is not error to permit cross-examination as to falsity of statements in the affidavit. Farmers' Product & Supply Co. v. Bond, 61 Okl. 244, 161 P. 181.

In action for injuries in runaway caused by fright of horse at escaping steam, cross-examination of plaintiff as to the disposition of the horse was proper. Talliaferro v. Atchison, T. & S. F. Ry. Co., 61 Okl. 27, 160 P. 69.

[60] Polley v. Kansas City Oil Co., 131 P. 577, 89 Kan. 272.

[61] Hopkins v. State, 9 Okl. Cr. 104, 130 P. 1101, Ann. Cas. 1915B, 736.

[62] Hager v. State, 10 Okl. Cr. 9, 133 P. 263.

has a right to show everything which may in the slightest degree affect his credibility.[63]

Where a witness is incompetent, for want of knowledge, to testify concerning the matters as to which he is called, and testifies to nothing material to the issue, it is not error to refuse to permit him to be cross-examined.[64] Likewise where a voluntary statement is made by a witness upon immaterial matter, though such statement is not objected to, it is not error for the court to refuse to permit a cross-examination with regard to the matter referred to therein.[65]

On the question of the quantum of damages recoverable, where the testimony consists mostly of expressions of opinion, great latitude of cross-examination is permissible.[66] An attorney, whose claim of lien upon a fund is denied because the court is convinced that he has performed no services entitling him thereto, has no standing to complain of a refusal to allow him to cross-examine the makers of affidavits used by other claimants.[67]

The trial court should exercise sound discretion in limiting the cross-examination of plaintiff's witnesses testifying as to value of property when it is sought to draw out a detailed description of various other properties in the vicinity.[68]

In a personal injury case, the plaintiff, on cross-examination, should be required to answer the question whether he is willing to submit to a physical examination by reputable physicians, acting under the appointment of the court.[69]

Where an action is commenced by the holder of a note claiming to be an innocent purchaser, who, instead of resting on the prima facie effect of the note, presents the payee as a witness to establish his ownership and right to negotiate such note, the witness will be subject to a cross-examination as in other cases.[70]

63 State v. Collins, 5 P. 368, 33 Kan. 77.

On cross-examination of state's witness, the defendant may show bias and contradictory statements. Yoder v. State (Okl. Cr. App.) 197 P. 848.

64 Watkins v. United States, 50 P. 88, 5 Okl. 729.

65 Cone v. Smyth, 45 P. 247, 3 Kan. App. 607.

66 Central Branch U. P. R. Co. v. Andrews, 2 P. 677, 30 Kan. 590.

67 Ricardo v. Central Coal & Coke Co., 171 P. 351, 102 Kan. 170.

68 Wichman v. Kansas City, M. & O. Ry. Co., 114 P. 212, 84 Kan. 339.

69 Chicago, R. I. & P. Ry. Co. v. Hill, 129 P. 13, 36 Okl. 540, 43 L. R. A. (N. S.) 622; Atchison, T. & S. F. Ry. Co. v. Melson, 40 Okl. 1, 134 P. 388, Ann. Cas. 1915D, 760.

70 Nickleson v. Dial, 93 P. 606, 77 Kan. 8.

Where a witness on direct examination is interrogated relative to a conversation, the opposing party may draw out all the material portions of such conversation pertinent to the issues on cross-examination, and the acts and conduct of a witness variant from his testimony, and inconsistent therewith, may be shown to weaken his testimony.[71]

Where material testimony of a witness for the state was declared by the witness to rest on a memorandum made by him in a book not produced in court, it was error to limit the cross-examination in respect to the alleged memorandum book.[72]

§ 854. Limitation to subjects of direct examination

Except as affecting his credibility,[73] a witness cannot be properly cross-examined as to matters not directly connected with the facts testified to in chief,[74] although the matters concern transactions connected with the facts in controversy.[75]

[71] Gibbons v. Territory, 115 P. 129, 5 Okl. Cr. 212.

[72] State v. Shew, 57 P. 137, 8 Kan. App. 679.

[73] Reeves & Co. v. Brown, 102 P. 840, 80 Kan. 292.

The exceptions are where the questions tend to show interest, bias, or prejudice, or to explain, modify, or qualify former statements. Lawder v. Hinderson, 14 P. 164, 36 Kan. 754.

The extent of the cross-examination of a witness, though extending to matters not inquired about in the examination in chief, is largely within the discretion of the court. Harrold v. Territory, 89 P. 202, 18 Okl. 395, 10 L. R. A. (N. S.) 604, 11 Ann. Cas. 818, judgment reversed 169 F. 47, 94 C. C. A. 415, 17 Ann. Cas. 868. The cross-examination of a witness should be confined to matters concerning which the witness has been examined in chief, but he may be asked any question which reasonably tends to explain, contradict, or discredit his testimony or to test his memory or veracity. Id.

[74] Kuhn v. Johnson, 137 P. 990, 91 Kan. 188; Chicago, R. I. & P. Ry. Co. v. Beatty, 34 Okl. 321, 118 P. 367, 42 L. R. A. (N. S.) 984; Maier v. Randolph, 6 P. 625, 33 Kan. 340; Prosser v. Pretzel, 55 P. 854, 8 Kan. App. 856; Woods v. Faurot, 77 P. 346, 14 Okl. 171; State v. Hoerr, 129 P. 153, 88 Kan. 573; Coon v. Atchison, T. & S. F. Ry. Co., 89 P. 682, 75 Kan. 282.

In an action against a city for personal injuries caused by a defective sidewalk, a question on cross-examination as to whether the street, at the place where the accident occurred, was not lighter than elsewhere, is properly excluded when there was nothing said in regard to light in the direct examination of the witness. City of Atchison v. Rose, 23 P. 561, 43 Kan. 605.

The testimony of a witness upon direct examination merely identifying a certificate of deposit of money, and the signature of the payee thereof, with a statement that such certificate had been paid by the bank issuing it, does

[75] State v. Long, 103 Kan. 302, 175 P. 145.

A party desiring his testimony as to other facts should make him his own witness.[76] However, this rule should be enforced with discretion.[77]

The cross-examination of a witness is not to be confined to the particular questions asked, nor the precise subject called to his attention on direct examination, but may extend to any matter not foreign to the subject-matter of such examination and tending to limit, explain, or modify it, and testimony tending to show the interest or bias to witness or lack of it, drawn out on cross-examination, is not collateral.[78]

§ 855. Collateral and irrelevant matters

Cross-examination as to purely collateral or irrelevant matters should not be permitted.[79]

not authorize a cross-examination as to the ownership of the money represented by it. Wright v. Wright, 50 P. 444, 58 Kan. 525.

In replevin by a wife to recover property seized by a creditor of the husband, where the husband testified for plaintiff only as to the demand and the bringing of suit, he could not be cross-examined as to previous statements made by him concerning the property. Butler v. Cooper, 42 P. 839, 3 Kan. App. 145.

In a will contest the court properly confined the cross-examination to matters covered by the direct examination. Kerr v. Kerr, 116 P. 880, 85 Kan. 460.

It is not error to allow a witness for the plaintiff, who, in his direct examination, testifies that he collected certain freight bills of the defendant, to tell the amount he so collected, on cross-examination. E. Rothschild & Bros. v. Hays, 59 P. 660, 9 Kan. App. 193.

[76] Seifert v. Schaible, 105 P. 529, 81 Kan. 323.

[77] The course and extent of the cross-examination of a witness, relative to matters not inquired about in his examination in chief, is largely within the sound discretion of the trial court. Hopkins v. State, 9 Okl. Cr. 104, 130 P. 1101.

[78] Gibbons v. Territory, 115 P. 129, 5 Okl. Cr. 212.

[79] In a prosecution for statutory rape, where evidence has been introduced in corroboration of the complaining witness, it is not necessarily error to sustain objections to questions asked of her on cross-examination as to her relations with other men; no attempt being made to show any other paternity of the child born to her. State v. Gereke, 86 P. 160, 74 Kan. 196, judgment reversed on rehearing Same v. Gerike, 87 P. 759, 74 Kan. 196.

In an action to recover damages for an assault, it was not error to refuse to allow defendant to cross-examine one of plaintiff's witnesses by asking if the manner and actions of plaintiff led the witness to believe that, if she got the gun, she would shoot defendant, where defendant's answer averred that he struck plaintiff, if at all, while repelling an assault on himself, as the evidence called for was immaterial. Allen v. Lizer, 58 P. 238, 9 Kan. App. 548.

It was shown on cross-examination of one of the state's witnesses that such

§ 856. Character witness

Where a witness testifies as to defendant's general reputation, considerable latitude may be given in cross-examination as to his opportunity for knowledge thereof.[80]

Witnesses who have testified favorably to defendant's general reputation as to peace and good conduct may be asked on cross-examination whether they have not heard reports of particular acts inconsistent with such reputation.[81]

§ 857. Cross-examination of party

The latitude allowed in the cross-examination of a party as a witness, tending to test his veracity or on matters directly connected with the subject of his examination in chief, rests in the sound discretion of the trial court, and will not be controlled on appeal, except in cases of abuse of discretion.[82]

§ 858. Recalling witness

The court may in its discretion permit a witness to be recalled for further cross-examination.[83]

witness had been charged with bastardy, tried, and acquitted. Held, that a question as to who made the complaint was immaterial. State v. Stockman, 58 P. 1006, 9 Kan. App. 888.

In prosecution for manslaughter, cross-examination of defendant's witness as to his statement in another's presence that he knew that defendant would kill deceased, tending only to prove witness' opinion, was collateral and irrelevant. Willis v. State, 13 Okl. Cr. 700, 167 P. 333.

Cross-examination of deputy sheriff to show that justice of peace receiving defendant's waiver of examination had filed no bond since his last election was properly excluded. State v. Sweet, 101 Kan. 746, 168 P. 1112. In prosecution for murder, cross-examination of state's witnesses as to some "Bill Smith" who was in neighborhood when murder was committed, and as to whether such a man later appeared with scratches on his face and a black eye, was improper. Id.

Whether a fact inquired of on cross-examination is collateral depends upon whether the examining party might prove it as a part of his case to establish his plea. Willis v. State, 13 Okl. Cr. 700, 167 P. 333.

[80] State v. Pipes, 70 P. 363, 65 Kan. 543.

A witness in a criminal case, who testified to the fair reputation of defendant for honesty, may be cross-examined as to whether he had not heard of defendant's being arrested for larceny. State v. McDonald, 46 P. 966, 57 Kan. 537.

[81] State v. Killion, 148 P. 643, 95 Kan. 371.

[82] Bassett v. Glass, 70 P. 336, 65 Kan. 500.

Questions propounded on cross-examination of plaintiff as to conversations

[83] State v. Lewis, 43 P. 265, 56 Kan. 374.

Division III.—Redirect Examination

§ 859. Scope and extent

Where a matter of evidence is brought out for the first time on the cross-examination of a witness, the other party may re-examine upon the same matter.[84]

Where a witness takes the stand and testifies as to matters about which he is competent to testify, and the other party on cross-examination inquires of him, over the objections of the party producing him, as to matters about which he is incompetent to testify, such party will not be heard to say that the court committed error in permitting such witness on redirect examination to explain the transactions elicited on cross-examination, even though as to such matters the witness was incompetent.[85] But matters which are entirely new, so far as his testimony is concerned, cannot be brought out on redirect examination.[86]

It was error, in an action against a railroad company to recover damages resulting from a fire set by a locomotive, to permit a witness who testified for plaintiff to explain his apparent hostility to the company by stating that it had refused to settle claims interposed against it by him on an equitable basis.[87]

between him and third persons were properly excluded. Musick v. Enos, 148 P. 624, 95 Kan. 397.

Where plaintiff was called as a witness by defendant in an action for the death of her husband at a street crossing and testified that she had often been over it with him, she was properly allowed on cross-examination to testify that he always drove carefully and at night always stopped to look and listen. Fike v. Atchison, T. & S. F. Ry. Co., 133 P. 871, 90 Kan. 409.

[84] Hamilton v. Miller, 26 P. 1030, 46 Kan. 486.

[85] Veseley v. Engelkemier, 61 P. 924, 10 Okl. 290.

[86] In February, C. purchased goods from plaintiff company on credit, and in the following May made a contract with plaintiff's agent, which was intended by both parties to be a sale of the property back to plaintiff. On a trial for the conversion of the goods, one of defendants, who took possession under a mortgage from C., was asked on his redirect examination if he took an inventory of the stock at the time he took possession of it, which was the time of the alleged conversion, and, having answered in the affirmative, was asked to state its actual cash value at that time which was objected to as not proper redirect examination. Held that, as on his examination in chief the witness was not asked in regard to the value of the property, and the question involved new facts so far as his testimony was concerned, the objection was properly sustained. Robinson v. Peru Plow & Wheel Co., 31 P. 988, 1 Okl. 140.

[87] Atchison, T. & S. F. R. Co. v. Briggs, 43 P. 289, 2 Kan. App. 154.

ARTICLE III

COMPETENCY AND PRIVILEGE

Sections

860. In general.
861. Knowledge—Signature—Books and accounts.
862. Persons interested.
863. Adverse party.
864. Incompetents.
865. Husband and wife.
866. Attorney and client.
867. Clergyman or priest.
868. Physician and patient.
869. Construction of statutes.
870. Conviction of crime.
871. Self-incrimination.
872. Waiver.
873. Transactions with decedent.
874. Witness privileged from being sued.

§ 860. In general

The competency of a witness is for the court and not for the jury.[88]

One entirely ignorant of the meaning of the ceremony of administering an oath is not a competent witness.[89]

A witness is not rendered incompetent to testify by reason of his disbelief in the existence of God.[90]

The trial judge cannot, over objection, give material testimony for a litigant.[91]

The secrecy imposed by the common law and statutes on proceedings before a grand jury will not prevent the public or an individual from proving by members of the jury what passed before it when, after the purpose of secrecy has been effected, such disclo-

[88] Western Nat. Life Ins. Co. v. Williamson-Halsell-Frazier Co., 131 P. 691, 37 Okl. 213.

When a witness is objected to on the ground that he or she is incompetent by reason of want of intelligence, it is the province of the trial court to determine the witness' competency. Adams v. State, 114 P. 347, 5 Okl. Cr. 347.

[89] Lee v. Missouri Pac. Ry. Co., 73 P. 110, 67 Kan. 402, 63 L. R. A. 271.

[90] Dickinson v. Beal, 62 P. 724, 10 Kan. App. 233.

[91] Powers v. Cook, 48 Okl. 43, 149 P. 1121, L. R. A. 1917F, 766.

A district judge is not competent as a witness in a cause tried before him. Gray v. Crockett, 10 P. 452, 35 Kan. 66, rehearing denied 12 P. 129, 35 Kan. 686.

sure becomes necessary in the furtherance of justice or the protection of public or individual rights.[92]

Where a defendant is prosecuted for perjury, members of the grand jury are competent witnesses to testify orally as to the statements made by the defendant before the grand jury.[93]

§ 861. Knowledge—Signature—Books and accounts

A witness must have actual knowledge of the facts about which he is called upon to testify.[94]

[92] State v. Campbell, 85 P. 784, 73 Kan. 688, 9 L. R. A. (N. S.) 533, 9 Ann. Cas. 1203.

[93] Pilgrim v. State, 104 P. 383, 3 Okl. Cr. 49.

[94] On a trial for obtaining property by means of a worthless check, the cashier of the bank on which it was drawn, under whose supervision the bank's books were kept, was competent to testify that defendant had no money subject to check, though his knowledge was gained from the books. State v. McCormick, 46 P. 777, 57 Kan. 440, 57 Am. St. Rep. 341.

It is not error to refuse to permit a witness to testify as to the grade or value of cotton in Galveston, where he did not class the cotton at the time it was shipped by him, and did not know its value at the time in question. Smoot & Abbott v. W. L. Moody & Co., 125 P. 1134, 34 Okl. 522.

Where it is not shown that a party is acquainted with, or has any knowledge whatever of, the chattel mortgage records or of any records of the register of deeds' office, except that he has inspected the records, and he is not the register of deeds, or any deputy thereof, it is not error to refuse to allow him to testify that a certain mortgage is not recorded. Buxton v. Alton-Dawson Mercantile Co., 90 P. 19, 18 Okl. 287.

Carriers.—In an action against a connecting carrier for loss of goods, a witness who had no knowledge of the weight of the car when delivered to the connecting carrier, and had never been in its employ, and was not connected with the execution of the waybill, could not testify as to the weight of the car from the bill when received by the connecting carrier. St. Louis, I. M. & S. Ry. Co. v. Carlile, 128 P. 690, 35 Okl. 118.

Where a person has lived several months on a farm near a railroad crossing of a public highway, and his business requires him to cross the track frequently, and he is able to tell the time the regular trains pass the crossing, he is competent to testify whether a particular train is an irregular or extra one. Missouri Pac. Ry. Co. v. Stevens, 12 P. 25, 35 Kan. 622.

In an action for damages from delay in a shipment of cattle, a witness could testify as to what was a reasonable time to transport cattle between two certain points, where the question was objected to, "unless the witness knows exactly the time our trains are run" between those points. St. Louis & S. F. R. Co. v. Peery, 138 P. 1027, 40 Okl. 432.

Reputation.—It is a sufficient predicate for admission of reputation evidence that witness has sworn that he knows general reputation of place involved in prosecution for unlawful possession of liquors for the particular kind of business, provided such general reputation relates to time of offense and to locality, and is material. Ward v. State, 15 Okl. Cr. 150, 175 P. 557.

Before a witness can testify to a signature on a written instrument, it must appear that the witness saw the instrument executed, that he was acquainted with the signature of the party, or that he is competent to testify by reason of comparison with other signatures known to be genuine.[95]

A witness who has not kept the books or the pay rolls, and who has no recollection of the facts independently of them, cannot state the contents of such books or pay rolls.[96]

It is not competent to prove the condition of a long account between a bank and one of its customers by the oral testimony of the cashier of the bank, where it is not shown that the cashier is the bookkeeper, or that the books are kept under his supervision, or that he has any knowledge of such books.[97]

An objection to evidence on the ground that it is incompetent does not go to the competency of the witness.[98]

§ 862. Persons interested

"No person shall be disqualified as a witness in any civil action or proceeding, by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credibility." [99]

It is not improper for officers charged with the enforcement of the law to employ detectives to procure evidence for the prosecution of those who violate the law, so as to render their testimony inadmissible.[1]

"Nothing in the preceding section contained shall, in any manner, affect the laws now existing, relating to the settlement of

[95] Miller v. Thompson, 50 Okl. 643, 151 P. 192.

[96] Paola Gas Co. v. Paola Glass Co., 44 P. 621, 56 Kan. 614, 54 Am. St Rep. 598.

[97] Mann v. Second Nat. Bank of Springfield, 10 P. 150, 34 Kan. 746.

[98] City of Topeka v. Griffey, 51 P. 296, 6 Kan. App. 920.

[99] Rev. Laws 1910, § 5046.

Under Code Civ. Proc. § 317 (Gen. St. 1909, § 5911), witnesses are not disqualified, though directly or indirectly interested in outcome of lawsuit; their interest affecting only their credibility. Meador v. Manlove, 156 P. 731, 97 Kan. 706; Hess v. Hartwig, 112 P. 99, 83 Kan. 592.

That purchases of liquors were made by persons seeking to ascertain if the seller was engaged in the unlawful sale thereof does not render the testimony of such purchasers incompetent. State v. Spiker, 129 P. 195, 88 Kan. 644.

[1] De Graff v. State, 103 P. 538, 2 Okl. Cr. 519.

estates of deceased persons, infants, idiots or lunatics, or the attestation of the execution of last wills and testaments, or of conveyances of real estate, or of any other instrument required by law to be attested." [2]

§ 863. Adverse party

"Any party to a civil action or proceeding may compel any adverse party or person, for whose benefit such action or proceeding is instituted, prosecuted or defended, at the trial, or by deposition, to testify as a witness in the same manner, and subject to the same rules, as other witnesses." [3]

§ 864. Incompetents

Among the persons incompetent to testify are "persons who are of unsound mind at the time of their production for examination," [4] and "children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly." [5]

The question of the competency of a witness of tender age is addressed to the trial court's discretion,[6] and may be determined during its examination rather than before its examination.[7]

§ 865. —— Husband and wife

Husband and wife are incompetent to testify "for or against each other, except concerning transactions in which one acted as the

[2] Rev. Laws 1910, § 5047.

[3] Rev. Laws 1910, § 5048.

[4] Code Civ. Proc. (St. 1893) § 335, relating to the competency as witnesses of "persons of unsound mind," means persons whose minds are so defective that they cannot correctly relate facts, and do not understand or realize what they are saying or doing. The trial court must determine, on examination of the witness, and from other evidence, if necessary, as to his competency. City of Guthrie v. Shaffer, 54 P. 698, 7 Okl. 459.

[5] Rev. Laws 1910, § 5050.

[6] Seigler v. State, 11 Okl. Cr. 131, 145 P. 308.

The question of the competency of a witness under ten years of age is addressed peculiarly to the discretion of the trial court. Darneal v. State, 14 Okl. Cr. 540, 174 P. 290, 1 A. L. R. 638; Collins v. State, 15 Okl. Cr. 96, 175 P. 124.

Whether child of five years is competent to testify is ordinarily question for final determination by trial court. State v. Gaunt, 157 P. 447, 98 Kan. 186.

A nine year old child held competent to testify. Walker v. State, 12 Okl. Cr. 179, 153 P. 209.

[7] State v. Douglas, 37 P. 172, 53 Kan. 669.

agent of the other, or when they are joint parties and have a joint interest in the action; but in no case shall either be permitted to testify concerning any communication made by one to the other during the marriage, whether called while that relation subsisted, or afterwards." [8]

[8] Rev. Laws 1910, § 5050; Nix v. Gilmer, 50 P. 131, 5 Okl. 740; Hampton v. State, 123 P. 571, 7 Okl. Cr. 291, 40 L. R. A. (N. S.) 43.

Husband and wife are incompetent to testify for and against each other, except in transactions in which one acted as the agent of the other, or where they have a joint interest in the action. St. Louis & S. F. R. Co. v. Bloom, 39 Okl. 78, 134 P. 432; Herron v. M. Rumley Co., 116 P. 952, 29 Okl. 317; Wade v. Sumner, 30 Okl. 784, 120 P. 1011.

Husband held an incompetent witness to testify for or against his wife in action in ejectment and to quiet title, where main issue was whether conveyance of wife's property executed by herself and husband was a deed or a mortgage. Thomas v. Halsell, 63 Okl. 203, 164 P. 458.

Where two defendants are sued jointly, and a joint answer and defense are made by them, the wife of one is not competent to testify to a matter sustaining the joint defense, and which necessarily affects the right of her husband equally with that of his codefendant. Arn v. Mathews, 18 P. 65, 39 Kan. 272.

Where, in an action to set aside a will, the principal legatee died pending the action, and a revivor was had in the name of his widow, who was his executor and sole heir at law, she was not incompetent as a witness because the widow of one of the original parties, where she did not testify to any communications between herself and husband during their marriage. Harper v. Harper, 113 P. 300, 83 Kan. 761.

In an action to set aside a fraudulent conveyance, the wife of the grantee is not competent to testify either in behalf of her husband or the grantor, no evidence being admissible in behalf of the latter, he not being a necessary party. Metzger v. Burnett, 48 P. 599, 5 Kan. App. 374.

In replevin against a married woman, unless her husband is a party to the action, or has a joint interest therein, or is his wife's agent, he is incompetent as a witness for plaintiff. Flohr v. Schwartzberg, 59 P. 666, 9 Kan. App. 215.

On appeal from a judgment of a justice of the peace, the wife of appellant, who was made a party in the justice court and filed a general denial, but against whom no judgment was rendered, will not be allowed to testify in favor of her husband, on the ground that she was a party to the suit in justice court, and intends to perfect an appeal, since no appeal will lie on her part. Nutt v. Gaddis, 59 P. 727, 10 Kan. App. 358.

Motion to strike out testimony of plaintiff, in action of slander, as to communication of use of alleged words to her, held properly overruled. Ramsey v. Partridge, 121 P. 343, 86 Kan. 398.

When a wife testifies upon direct examination, without objection, that she heard of the making of threats to arrest and imprison her husband, without stating from whom she heard them, and that in consequence she became so alarmed concerning him that she executed a mortgage upon her homestead,

For a husband or wife to be competent to testify for or against each other, it is essential, not only that they be joint parties, but also that they have a joint interest in the action.[9]

against her judgment and will, in order to insure his safety, her evidence, as to the bare fact of what she heard, is not rendered incompetent by a disclosure upon cross-examination that she heard it as a communication from her husband. State Bank v. Hutchinson, 61 P. 443, 62 Kan. 9.

Joint parties and interest.—A wife held not an incompetent witness where she was a joint party plaintiff with her husband and had a joint interest in the action. Ray v. Navarre, 47 Okl. 438, 147 P. 1019; Stewart v. Riddle, 76 Okl. 70, 184 P. 443; Young v. Blackert, 51 Okl. 285, 151 P. 1057.

A wife who, jointly with her husband, signed certain warranty deeds material to the issues, and who joined with her husband as plaintiff, and against whom defendants prayed judgment for breach of warranty, was competent to testify. West & Russell v. Rawdon, 130 P. 1160, 33 Okl. 399.

A wife who is a co-plaintiff with her husband, in an action to enjoin the sale under execution of their homestead, is a competent witness. Zimmerman v. Clarke, 58 P. 277, 9 Kan. App. 889.

As the husband and wife are jointly interested in an appeal by both from an award in condemnation proceedings of part of the homestead, owned by the wife, but occupied by both as a residence, the husband is a competent witness on the trial of the appeal. Chicago, K. & W. R. Co. v. Anderson, 21 P. 1059, 42 Kan. 297.

A mother was not rendered incompetent by Gen. St. 1909, § 5915, from testifying, in an action by her son against the estate of his deceased father for services, that her husband in his lifetime had told her that the son's services were worth $30 per month, and that he would get it when he died, etc., since such evidence was not for or against the deceased husband; his interest having upon his decease passed to others. In re Schaffner's Estate, 141 P. 251, 92 Kan. 570.

After marriage terminated.—A woman cannot testify against her former husband concerning any communication made by one to the other while the marriage relation existed. Adkins v. Wright, 131 P. 686, 37 Okl. 771.

A husband can in no case testify concerning any communication made by his wife to him during the marriage, whether called while that relation subsisted or afterwards. Herron v. M. Rumley Co., 116 P. 952, 29 Okl. 317.

Criminal cases.—In the prosecution of a father for willfully failing to properly support his children, the wife is a competent witness against him. Hunter v. State, 10 Okl. Cr. R. 119, 134 P. 1134, L. R. A. 1915A, 564, Ann. Cas. 1916A, 612.

In a prosecution for the sale of liquor, where the state's witness testified

[9] Guthrie v. Mitchell, 38 Okl. 55, 132 P. 138. In an action by a married woman suing for rents and profits on her land, she was not entitled under Comp. Laws 1909, § 5842, making a husband competent to testify for his wife concerning a transaction in which he acted as her agent, to have her husband measure the land, and then testify as to the number of acres ascertained by such measurements, where the opposite party was not a party to the measurement. Id.

Husband and wife are competent witnesses for or against each other concerning transactions in which one acted as the other's agent,[10] but the fact of such agency must be established before the testimony is offered.[11]

that the sale was made by defendant's wife at his home, she is a competent witness in his behalf. Tucker v. State, 125 P. 1089, 7 Okl. Cr. 634, denying rehearing 124 P. 1134, 7 Okl. Cr. 634.

The prosecutrix, when a married woman, is incompetent to testify to non-access of the husband during the period within which the child must have been begotten, or to any facts or circumstances from which such nonaccess may be inferred. Bell v. Territory, 56 P. 853, 8 Okl. 75.

In a criminal prosecution, where a letter previously written and sent by the defendant to his wife, is not in the custody or control of either the defendant or his wife, nor in the custody or control of any agent or representative of either, but is in the custody and control of a third person, who is called as a witness for the prosecution in the case, such letter may be used in the case as evidence against the defendant. Connella v. Territory, 86 P. 72, 16 Okl. 365.

In a prosecution for adultery the injured spouse is a competent witness. Kitchens v. State, 140 P. 619, 10 Okl. Cr. 603; Mitchell v. Same, 140 P. 622, 10 Okl. Cr. 697; Heacock v. State, 112 P. 949, 4 Okl. Cr. 606.

Under Cr. Code Kan. § 215 (Gen. St. Kan. 1909, § 6791), held not error to permit defendant's wife to testify to a conversation with him. State v. Marsee, 144 P. 833, 93 Kan. 600.

[10] Treiber v. McCormack, 136 P. 268, 90 Kan. 675, Ann. Cas. 1915B, 943; Stewart v. Riddle, 76 Okl. 70, 184 P. 443; Lowman v. Blaine County Bank, 139 P. 952, 40 Okl. 519.

The husband is a competent witness to testify on behalf of his wife in trial of a civil action, where the evidence discloses that he acted as her agent in reference to matters to which his evidence is directed, notwithstanding Rev. Laws 1910, § 5050. Bagg v. Shoenfelt (Okl.) 176 P. 511.

The wife is a competent witness in behalf of her husband in regard to transactions in which she acted as his agent. Bell v. Day, 57 P. 1054, 9 Kan. App. 111; Armstrong, Byrd & Co. v. Crump, 106 P. 855, 25 Okl. 452.

Defendant's wife was not competent to testify about any personal transaction between defendant and herself unless she was an agent in the transaction, under Rev. Laws 1910, § 5050. Johnson v. Walters, 59 Okl. 233, 158 P. 914.

A husband, acting as the agent of his wife, was a competent witness on her behalf as to all matters covered by such agency. Wiggins v. Foster, 55 P. 350, 8 Kan. App. 579.

In an action in which the husband is a party, a wife who has had charge of her husband's money is competent to testify as to the fact that it was loaned; the loaning being within the scope of her agency. Green v. McCracken, 67 P. 857, 64 Kan. 330.

Where the wife of one of the parties is produced as a witness on behalf of her husband to prove an admission by the adverse party that money being

[11] Fulkerson v. Kilgore, 64 P. 5, 10 Okl. 655.

The rule that an agency resting in parol can generally be proved by testimony of either the principal or the person claiming to act as agent applies when the purported agent is either the husband or wife of principal.[12]

Although the wife of a party is not competent to testify unless she is the agent of her husband, or has a joint interest in the action, a party can offer his wife as a witness and have her examined as to her competency, and it is not error to permit preliminary questions and answers to determine whether or not she acted as her husband's agent.[13] Where a husband merely authorizes his wife to act as his agent for a specific purpose, he may so testify.[14]

A wife may testify concerning a transaction in which she acted as her husband's agent, though her husband was present when the transaction occurred.[15]

That a husband under his wife's direction searched for a witness

paid by the husband to him was all that was due, it is not sufficient to render her competent as a witness that she wrote the receipt for the money and usually did her husband's writing and sometimes did other business for him, but it must appear that she was engaged in the settlement of the accounts between her husband and the adverse party and that she had general special authority from him to do so. Gulliford v. McQuillen, 89 P. 927, 75 Kan. 454.

In an action to recover for forcible eviction, plaintiff claiming to be in lawful possession of a farm under a verbal lease from defendant, held, that there was no competent evidence that the wife was the agent of her husband as to such lease so as to render admissible in evidence against him declarations and admissions made in his absence. Hayes v. Funk, 99 P. 1131, 79 Kan. 416.

[12] Bagg v. Shoenfelt (Okl.) 176 P. 511.

A husband may testify for his wife as to any business transacted by him for her as her agent. Smith v. Travel, 94 P. 529, 20 Okl. 512. A husband is a competent witness to testify that he acted as agent of his wife. Id.

A husband or wife is competent to show his or her authority to act as agent of the other. Wichita & W. R. Co. v. Kuhn, 16 P. 75, 38 Kan. 104, judgment reversed on rehearing 17 P. 322, 38 Kan. 675; Paulsen v. Hall, 18 P. 225, 39 Kan. 365.

A wife may testify in her own behalf, in a suit between herself and another, to the creation by her of an agency in her husband, and to its execution by him. McAdow v. Hassard, 48 P. 846, 58 Kan. 171.

[13] Wade v. Sumner, 30 Okl. 784, 120 P. 1011.

Evidence on the question of the wife's competency to testify held to show that she acted as her husband's agent in the transaction on which her testimony was sought. Western Nat. Life Ins. Co. v. Williamson-Halsell-Frazier Co., 131 P. 691, 37 Okl. 213.

[14] Bell v. Day, 57 P. 1054, 9 Kan. App. 111.

[15] Western Nat. Life Ins. Co. v. Williamson-Halsell-Frazier Co., 131 P. 691, 37 Okl. 213.

did not render him competent to testify on his wife's behalf as her agent, to a conversation between himself and the witness for the purpose of impeaching the witness.[16]

Where a husband accompanies his wife to hear a conversation between her and a third person, he is not acting as her agent in such sense as to make him competent as a witness.[17]

Where an action is brought by the wife, and the husband, who is not a party or interested in the action, is introduced as a witness in her behalf, the examination of such witness must be confined strictly to transactions in which the husband acted as the agent of the wife.[18]

Where, in absence of the husband from home, the wife acts in the protection of property owned by him and within the home limits, she is acting as his agent, and is a competent witness in an action by or against him as to conversations with regard to such property.[19]

A husband acting for his wife's interest in a homestead, and whose acts were ratified with knowledge, was her agent and competent to testify in regard thereto.[20]

The fact that, in an action against a husband and wife judgment is first rendered against the husband, does not make him any less a joint party with her, so as to render him an incompetent witness.[21]

Where a married woman was defendant in foreclosure, and her cross-petition was dismissed and she was dismissed out of the case, the testimony of her husband was competent.[22]

16 Muskogee Electric Traction Co. v. McIntire, 133 P. 213, 37 Okl. 684, L. R. A. 1916C, 351.

17 Fish v. Bloodworth, 129 P. 32, 36 Okl. 586.

18 Council Grove, O. C. & O. Ry. Co. v. Center, 22 P. 574, 42 Kan. 438.

It is not error to permit the husband of plaintiff to testify on the trial of an action by her, where he has acted as her agent as to matters to which her evidence is directed. Bland v. Peters, 30 Okl. 798, 120 P. 631.

19 Calloway & Son v. Wrench (Okl.) 175 P. 209.

Where, in the husband's absence, the wife acts in protection of property claimed by him, though without express direction, she is a competent witness, in an action by or against him, as to what she does and says in relation therewith. McDonald v. Cobb, 52 Okl. 581, 153 P. 138.

20 State Mut. Ins. Co. v. Green, 62 Okl. 214, 166 P. 105, L. R. A. 1917F, 663.

21 Atchison Sav. Bank v. Means, 58 P. 989, 61 Kan. 857.

22 Van Valkenburg v. Lynde, 66 P. 994, 63 Kan. 887.

A husband is a competent witness in an action brought by his wife as an executrix of the estate of a deceased person.[23]

The wife is incompetent to testify, where the husband is interested in the result of the case, though the action is in the name of a third party.[24]

The clause forbidding a husband or wife testifying concerning communications made by one to the other during marriage is not affected by their being joint parties and jointly interested in the action, or by one having acted as the agent of the other.[25]

A husband cannot testify to a communication made by him to his wife concerning property claimed by her.[26]

In an action by a husband for alienating the affections of his wife, he is not incompetent to testify as to transactions or communications not had by him with his wife.[27]

A conversation between husband and wife in the presence or hearing of another is not a confidential communication.[28]

The wife of one who is interested in an action only as the next friend of a minor plaintiff is a competent witness in the case.[29]

In husband's action for personal injury, the wife was a competent

[23] Van Fleet v. Stout, 24 P. 960, 44 Kan. 523.

[24] Western Nat. Life Ins. Co. v. Williamson-Halsell-Frazier Co., 131 P. 691, 37 Okl. 213.

[25] Marshall v. Marshall, 80 P. 629, 71 Kan. 313.

The plaintiff caused the deposition of one of the defendants to be taken prior to the trial, in which the witness gave testimony concerning communications had with her husband during the marriage, and prior to his death. Held, that the testimony falls within the prohibition of the Code which forbids husband or wife "to testify concerning any communication made by one to the other during marriage, whether called while that relation subsisted or afterwards," and its admission over the objection of the defendants was error. French v. Wade, 11 P. 138, 35 Kan. 391.

[26] Van Zandt v. Schuyler, 43 P. 295, 2 Kan. App. 118.

Under Civ. Code, § 323, providing that in no case can either the husband or wife testify concerning any communication made by one to the other during the marriage, a husband cannot so show his life interest in property standing in his wife's name. Chicago, K. & N. Ry. Co. v. Ellis, 34 P. 352, 52 Kan. 48.

[27] Roesner v. Darrah, 70 P. 597, 65 Kan. 599.

Husband suing for damages for the alienation of the affections of his wife and her seduction is a competent witness, except as to his transactions or communications with her. Potter v. Womach, 63 Okl. 107, 162 P. 801.

[28] State Bank v. Hutchinson, 61 P. 443, 62 Kan. 9; State v. Gray, 39 P. 1050, 55 Kan. 135.

[29] Potter v. Stamfli, 44 P. 46, 2 Kan. App. 788.

witness to testify as to the fact of her telephone conversation with defendant's wife, and to detail the message received for her husband.[30]

The mother, who was divorced from the child's alleged father, is a competent witness as to the child's paternity.[31]

That husband and wife were not married at the time the transaction occurred does not qualify them.[32]

The incompetency of a husband to testify must be raised by objection to competency as a witness, and not merely by an objection to the competency, relevancy, or materiality of the testimony.[33]

The prohibition against husband and wife being witnesses against each other is for the benefit of the husband and wife, and may be waived.[34]

§ 866. —— Attorney and client

It is also incompetent for an attorney to testify "concerning any communications made to him by his client, in that relation, or his advice thereon, without the client's consent." [35]

[30] Brownell v. Moorehead (Okl.) 165 P. 408.

[31] Lyon v. Lash, 99 P. 598, 79 Kan. 342.

[32] Sands v. David Bradley & Co., 129 P. 732, 36 Okl. 649, 45 L. R. A. (N. S.) 396.

In an action under Rev. Laws 1910, § 5281, for wrongful death, by a woman suing as widow of decedent, and as next friend to his children, the testimony of her present husband was incompetent under Rev. Laws 1910, § 5050, where he had not acted as her agent and was not a party. Smith v. Chicago, R. I. & P. Ry. Co., 142 P. 398, 42 Okl. 577.

The statute does not prevent one from testifying against the other after the marriage relation has terminated regarding independent facts which are not privileged communications. Adkins v. Wright, 131 P. 686, 37 Okl. 771.

Where plaintiff offers a witness in his behalf and defendant objects on the ground that she is the wife of the plaintiff, it is not error to admit in evidence a decree of divorce to show that the relations theretofore existing between them had been dissolved, and that she was a competent witness for plaintiff. Easterly v. Gater, 87 P. 853, 17 Okl. 93, 10 Ann. Cas. 888.

[33] Muskogee Electric Traction Co. v. McIntire, 133 P. 213, 37 Okl. 684, L. R. A. 1916C, 793.

In an action to cancel a mortgage by a husband and his wife, the objection that the testimony of the wife was incompetent was not well taken. Hartzell v. Hartzell, 141 P. 772, 42 Okl. 390. An objection to a wife as a witness because incompetent, to be available must be made on the ground of her incompetency. An objection on the ground that the testimony is incompetent does not raise the question of the competency of the witness. Id.

[34] Hampton v. State, 123 P. 571, 7 Okl. Cr. 291, 40 L. R. A. (N. S.) 43.

[35] Rev. Laws 1910, § 5050.

An attorney is incompetent to testify as to confidential communications with

A communication from a client to his attorney may be admitted in evidence, but the attorney, without his client's consent, is prevented from testifying concerning such communication.[36] No one other than the client or one in privity with him can raise the question of privilege between client and attorney;[37] nor can an attorney disclose privileged matter as a basis for an opinion that a client was of unsound mind at the time of a consultation had with him.[38] However, an attorney may express an opinion regarding the sanity of his client, from observations made in common with others in a nonprofessional capacity, or from facts which did not come to his knowledge because his professional advice had been sought.[39]

An attorney may testify that a certain person is his client, for this is not a privileged communication.[40]

his client. Pearson v. Yoder, 39 Okl. 105, 134 P. 421, 48 L. R. A. (N. S.) 334, Ann. Cas. 1916A, 62.

Good-faith communications between an attorney and his client, relating to the best method of protecting the client's interests, are privileged. Emerson v. Western Automobile Indemnity Ass'n, 105 Kan. 242, 182 P. 647.

An attorney cannot testify concerning any communication made to him by a client or his advice thereon without the client's consent. Brown v. State, 9 Okl. Cr. 382, 132 P. 359.

Communications made by complaining witness to the prosecuting attorney as to his knowledge of matters relating to probable guilt are privileged, and cannot be given in evidence over his objection in an action against him for malicious prosecution. Michael v. Matson, 105 P. 537, 81 Kan. 360, L. R. A. 1915D, 1.

In a proceeding by writ of error coram nobis to obtain relief from a sentence of imprisonment imposed seven years before on a plea of guilty obtained by duress, the deposition of plaintiff in the proceeding, who was still in prison, and not present at the trial, stated that one K. had never acted as his attorney, but on the trial K. testified that he was counsel for plaintiff when a certain conversation between them occurred. Held, that the action of the lower court in excluding this conversation as a privileged communication would not be disturbed. State v. Calhoun, 32 P. 38, 50 Kan. 523, 34 Am. St. Rep. 141, 18 L. R. A. 838.

This statute is but declaratory of the common law, and is for the benefit of the client, and not the attorney. Evans v. State, 115 P. 809, 5 Okl. Cr. 643, 34 L. R. A. (N. S.) 577.

[36] Tays v. Carr, 14 P. 456, 37 Kan. 141.

[37] Matthews v. McNeill, 157 P. 387, 98 Kan. 5.

[38] Sheehan v. Allen, 74 P. 245, 67 Kan. 712.

[39] Sheehan v. Allen, 74 P. 245, 67 Kan. 712.

[40] Arkansas City Bank v. McDowell, 52 P. 56, 7 Kan. App. 568.

Where a will is attacked for alleged undue influence, evidence of the attorney who drew the will as to who gave him the data therefor, and whose instructions he followed in preparing the same, was not objectionable as a dis-

In order for a communication from a client to his attorney to be confidential, and to impose upon the attorney the duty of not disclosing the same, it must be of a confidential character and so regarded, at least by the client, at the time, and must relate to a matter which is in its nature private and properly the subject of confidential disclosure.[41]

Communications made to an attorney who was acting for both parties, and made in the presence of both parties, are not privileged.[42]

An attorney may be compelled to produce papers belonging to his client, where the knowledge of their contents is accessible to others or to the public.[43] He may be compelled to produce any paper in his possession belonging to his client, which the client himself could be compelled to produce.[44]

An attorney may testify in behalf of his client, and the fact that his compensation as an attorney in the action is contingent on the result of the litigation does not render him incompetent, but goes to his credibility.[45]

Where statements are made to an attorney when no employment as an attorney is suggested or anticipated, and the relation of at-

closure of confidential communications. Kerr v. Kerr, 116 P. 880, 85 Kan. 460.

[41] In re Elliott, 84 P. 750, 73 Kan. 151.

[42] Sparks v. Sparks, 32 P. 892, 51 Kan. 195.

Testimony of an attorney who acted for grantor and grantee in preparing a contract as to a conveyance in fraud of the grantor's creditors held not privileged. Chicago Lumber Co. v. Cox, 147 P. 67, 94 Kan. 563.

[43] Pearson v. Yoder, 39 Okl. 105, 134 P. 421, 48 L. R. A. (N. S.) 334, Ann. Cas. 1916A, 62.

[44] Id.

After a party to a cause has voluntarily procured a reading of his unfiled pleading by a nonprofessional stranger, has published its contents in a newspaper interview, and spread it on the record of a court of general jurisdiction, in pleading against the attorney who assisted in preparing it, the privileged character of the document is waived, and the attorney is released from the confidential relation he bore before its publication, and his production of it for use in evidence against the party is not a breach of privilege. In re Burnette, 85 P. 575, 73 Kan. 609.

[45] Central Branch Union Pac. R. Co. v. Andrews, 21 P. 276, 41 Kan. 370.

Code Civ. Proc. Kan. § 321 (Gen. St. Kan. 1909, § 5914), does not prohibit an attorney from testifying relative to the preparation and execution of a will drawn by him, including information imparted by testator, in a proceeding to contest the will for fraud and undue influence. Black v. Funk, 143 P. 426, 93 Kan. 60.

torney and client does not exist, the communications are not privileged.[46]

Professional communications between a lawyer and his client are not privileged, when such communications are had for the purpose of being guided or assisted in the commission of a crime.[47]

The rule that privilege may not be urged respecting communications relating to perpetration of fraud is limited, ordinarily, to cases of actual fraud involving moral turpitude.[48]

An attorney is employed in his professional capacity when he is voluntarily listening to his client's preliminary statement, and it is not necessary that any retainer should have been promised, charged, or demanded, and it makes no difference, though the services are gratuitous.[49]

Where a client testifies as to confidential communications made by her to her attorney and as to his advice thereon, this operates as a consent that the attorney may testify as to what actually transpired between him and his client.[50]

[46] State v. Herbert, 66 P. 235, 63 Kan. 516; Robinson's Ex'rs v. Blood's Heirs, 62 P. 677, 10 Kan. App. 576.

A lawyer, who prepared a contract for decedent, may testify as to a conversation with the decedent when the contract was executed, to show that the deceased knew and understood the contents of the contract, if the relation of attorney and client did not exist between the witness and the decedent. Grimshaw v. Kent, 73 P. 92, 67 Kan. 463.

Where a person communicated to an attorney certain facts, which became important as evidence against the person making them in an action subsequently brought in which he was a party, and the attorney, without the consent of the person making such communication, was called by the adverse party as a witness, and the court excluded such testimony as being privileged, it was error, where the advice of the attorney was gratuitously given, and it was not known that he was an attorney, and the communications were not made under the seal of professional confidence. Union Pac. R. Co. v. Day, 75 P. 1021, 68 Kan. 726.

There was no relation of attorney and client between the defendants in a prosecution for criminal libel and the prosecuting officer, so as to exclude evidence of such officer, as to communications falsely charging a third person with crime. State v. Wilcox, 132 P. 982, 90 Kan. 80, 9 A. L. R. 1091.

[47] Morris v. State, 115 P. 1030, 6 Okl. Cr. 29.

[48] Emerson v. Western Automobile Indemnity Ass'n, 105 Kan. 242, 182 P. 647.

[49] Evans v. State, 115 P. 809, 5 Okl. Cr. 643, 34 L. R. A. (N. S.) 577.

[50] Brown v. State, 9 Okl. Cr. 382, 132 P. 359.

In a partition suit, that defendants had taken and filed, but had not used, the deposition of a witness claimed to be incompetent under Code Civ. Proc. Kan. § 321 (Gen. St. Kan. 1915, § 7223), respecting communications by a cli-

§ 867. —— Clergyman or priest

It is incompetent for a clergyman or priest to testify "concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession." [51]

§ 868. —— Physician and patient

It is incompetent for a physician or surgeon to testify "concerning any communication made to him by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by a personal examination of any such patient: Provided, that if a person offer himself as a witness, that is to be deemed a consent to the examination; also, if an attorney, clergyman or priest, physician or surgeon on the same subject, within the meaning of the last three subdivisions of this section." [52]

This provision of the Code merely grants a privilege to render physicians and surgeons incompetent to testify to certain communications.[53]

ent to his attorney, constituted a waiver of the privilege. Watson v. Watson, 104 Kan. 578, 180 P. 242.

In an action in conversion, where conspiracy is charged, it is not error to permit an attorney to testify that he had advised one of the defendants that an abstract of title showed defective title, for the purpose of showing notice of bad title; no objection being made that the conversation was privileged. American Trust Co. v. Chitty, 129 P. 51, 36 Okl. 479.

[51] Rev. Laws 1910, § 5050.

[52] Rev. Laws 1910, § 5050.

[53] Armstrong v. Topeka Ry. Co., 144 P. 847, 93 Kan. 493.

In bastardy proceedings, where the relatrix and the defendant agreed that a physician should make an examination for the purpose of determining the duration of pregnancy, statements made by the relatrix to the physician during the examination as to the date of her first intercourse with defendant were competent. Clark v. State, 61 P. 814, 8 Kan. App. 782.

Statements made by an injured employé to a surgeon called to attend him as to the position of the employé immediately preceding the accident are not privileged. Kansas City, Ft. S. & M. R. Co. v. Murray, 40 P. 646, 55 Kan. 336.

Code Civ. Proc. Kan. § 323, as amended in 1909 (Code Civ. Proc. Kan. § 321 [Gen. St. Kan. 1909, § 5915]), do not excuse a physician from testifying as to the time, manner, and circumstances of a street car accident resulting in injuries to a passenger. Armstrong v. Topeka Ry. Co., 144 P. 847, 93 Kan. 493.

A physician was employed to attend a patient, and afterwards the family physician took charge of the case. Within a few hours the physician first called again visited the patient, when a statement was made as to the cause of the injury. The patient stated that he regarded the doctor as his physi-

Testimony of a physician as to any communication made by his patient as to her disease, or knowledge obtained by him, may be given, if the patient testifies on the same subject.[54]

So, too, the heirs at law of one who has been treated by a physician may waive the privilege of making a physician incompetent to testify to any knowledge obtained in his professional capacity from his patient.[55]

A physician is not incompetent to testify as to communications by a patient or to knowledge obtained by a personal examination, where third persons were present.[56]

cian, but the doctor stated that he did not regard himself as such. Held, that the exclusion of the statement as privileged was not error. E. Patterson & Son v. Cole, 73 P. 54, 67 Kan. 441.

[54] Roeser v. Pease, 131 P. 534, 37 Okl. 222; Fulsom-Morris Coal & Mining Co. v. Mitchell, 132 P. 1103, 37 Okl. 575.

Where plaintiff testified as to the nature of her injuries, and the time and place of treatment, she waived the privilege granted by Comp. Laws 1909, § 5842, and rendered admissible the testimony of her physician on these subjects. City of Tulsa v. Wicker, 141 P. 963, 42 Okl. 539.

Where, in personal injury action, plaintiff testified that he had never suffered similar injury prior to accident, and denied that he had stated to his physician that he had suffered a similar injury, physician called by plaintiff as witness may be cross-examined as to such statement. Chicago, R. I. & P. Ry. Co. v. Hughes, 64 Okl. 74, 166 P. 411.

An applicant for life insurance may contract with the insurer waiving the privilege afforded him by Code Civ. Proc. § 323 (Gen. St. 1901, § 4771), rendering a physician incompetent to testify to professional communications from his patient. Metropolitan Life Ins. Co. v. Brubaker, 96 P. 62, 78 Kan. 146, 18 L. R. A. (N. S.) 362, 130 Am. St. Rep. 356, 16 Ann. Cas. 267.

A patient's consent that his physician shall testify to confidential communications is implied from failure to object when the physician is called to testify, provided the patient has opportunity to make objection. Id.

A physician may, with his patient's consent, testify to confidential communications. Id.

Under Code Civ. Proc. 1901, § 323, as amended in 1909 (Code Civ. Proc. § 321 [Gen. St. 1909, § 5915]), the giving of testimony by a patient without objection is equivalent to consent that the physician may testify to the same matter. Id.

[55] Bruington v. Wagoner, 164 P. 1057, 100 Kan. 10, 439.

The heirs at law of one who has been treated by a physician may waive the provisions of the statute making a physician incompetent to testify to any knowledge obtained in his professional capacity from the patient. Fish v. Poorman, 116 P. 898, 85 Kan. 237.

[56] In re Swartz's Will, 79 Okl. 191, 192 P. 203.

§ 869. —— Construction of statutes

Statutes in derogation of the competency of witnesses will be strictly construed in favor of competency.[57]

Statutes excluding certain persons from testifying will be strictly construed, and the exclusion will not be extended by implication to a class not named, but a witness will be deemed competent unless clearly rendered incompetent by the terms of the statute.[58]

§ 870. Conviction of crime

The fact that a witness has been convicted of any felony except perjury does not disqualify him.[59]

§ 871. Self-incrimination

No person shall be compelled to give evidence which will tend to incriminate him, except as in the Constitution provided. A person having knowledge of facts that tend to establish the guilt of any other person charged with an offense shall not be excused from giving testimony on the ground that it may tend to incriminate him, but no person shall be prosecuted on account of any transaction concerning which he may so testify. A person under examination before a county judge in an investigation into supposed violations of the prohibitory law is not obliged to answer questions, where his answers will tend to incriminate him, unless the inquisition is held to inquire into a complaint made, supported by affidavit charging an offense against the prohibitory law.[60]

[57] Armstrong v. Topeka Ry. Co., 144 P. 847, 93 Kan. 493.

[58] Savage v. Modern Woodmen of America, 113 P. 802, 84 Kan. 63, 33 L. R. A. (N. S.) 773.

It is not against public policy to require a banker to disclose the amount of a depositor's balance, nor are the transactions between him and the depositor privileged in a legal sense. In re Davies, 75 P. 1048, 68 Kan. 791.

[59] Price v. State, 9 Okl. Cr. 359, 131 P. 1102.

St. 1893, § 2578, providing that a person sentenced to imprisonment for life is deemed civilly dead, does not affect his competency as a witness. Martin v. Territory, 78 P. 88, 14 Okl. 598. St. 1893, § 4209, provides that no person shall be disqualified as a witness because of his conviction of a crime, but such conviction may be shown to affect his credibility. Section 5207 provides that the rules of evidence in civil cases except as otherwise provided are applicable to criminal cases. Held, that one under sentence for life is not disqualified from testifying in a criminal case. Id.

[60] Ex parte Gudenoge, 100 P. 39, 2 Okl. Cr. 110.

Const. Bill of Rights, §§ 21, 27.

In inquisition under Laws 1917, c. 198, to determine origin of a fire, a wit-

The manifest purpose of the constitutional provisions, both of the United States and of the state, is to prohibit the compelling of evidence of a self-criminating kind from a witness.[61]

No statute, which leaves a party or witness the subject of prosecution after he answers the incriminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution, but to be valid the statute must afford absolute immunity against future prosecution.[62] The constitutional provisions must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him in any criminal proceeding or for the enforcement of any penalty or forfeiture.[63]

The privilege against self-crimination does not protect the officers of an insolvent institution in resisting production of the books,

ness may claim his constitutional privilege of refusing to give incriminating answers. State v. Harris, 103 Kan. 347, 175 P. 153.

A justice of the peace, acting as a coroner at an inquest for murder, cannot compel a witness to answer incriminating questions. Faucett v. State, 10 Okl. Cr. 111, 134 P. 839, L. R. A. 1918A, 372.

Where a defendant offers the testimony of a codefendant jointly indicted with him, it is not error to refuse to compel the witness to answer any question which the witness claims will incriminate him, and which he declines to answer on that ground. Anderson v. State, 126 P. 840, 8 Okl. Cr. 90, Ann. Cas. 1914C, 314.

Where, in a prosecution for bastardy, a witness declines to answer the question as to whether he had intercourse with the relatrix, on the ground that his answer might render him liable to a criminal prosecution, he cannot be required to answer if it reasonably appear that the answer would expose him to such prosecution, or if the fact on which he is interrogated would lead to his conviction of a crime. Stevens v. State, 32 P. 350, 50 Kan. 712.

It is improper for prosecuting attorney to demand accused in the presence of the jury to produce any document referred to containing evidence tending to incriminate him. Crump v. State, 124 P. 632, 7 Okl. Cr. R. 535.

Code, Kan. § 482, "in aid of execution," authorizing the district judge to require a judgment debtor to appear before him to answer concerning his property, which he unjustly refuses to apply towards the satisfaction of a judgment rendered against him, and to order any money in his actual possession and under his control, not exempt by law, to be applied to the satisfaction of the judgment under which the proceedings are had, and to enforce said orders by proceedings for contempt in case of refusal or disobedience, does not violate Bill of Rights, § 10, providing that no person shall be a witness against himself. In re Burrows, 7 P. 148, 33 Kan. 675.

[61] Ex parte Gudenoge, 100 P. 39, 2 Okl. Cr. 110.

[62] Id.

[63] Id.

records, and papers, because such documents may tend to incriminate them.[64]

A state statute providing that no person giving evidence shall be prosecuted for any violation of the act about which he may testify, a witness cannot refuse to testify on the claim that the immunity afforded does not afford protection against the possibility of his evidence being used against him in a prosecution for violations of a federal statute.[65] This is because the privilege cannot be claimed by a witness when by the terms of an immunity statute the immunity afforded is coextensive with the constitutional privilege of silence.[66]

§ 872. —— Waiver

Where a defendant exercises his privilege to testify in his own behalf, he waives his constitutional privilege and is subject to the same rules of cross-examination as other witnesses.[67]

The election to testify having once been made, the privilege of not testifying is waived at every subsequent stage.[68] However,

[64] Burnett v. State, 129 P. 1110, 8 Okl. Cr. 639, 47 L. R. A. (N. S.) 1175.

[65] State v. Jack, 76 P. 911, 69 Kan. 387, 1 L. R. A. (N. S.) 167, 2 Ann. Cas. 171, judgment affirmed Jack v. State of Kansas, 26 S. Ct. 73, 199 U. S. 372, 50 L. Ed. 234, 4 Ann. Cas. 689; In re Bell, 76 P. 1129, 69 Kan. 855.

[66] Id.

Laws 1897, p. 485, c. 265, § 10, providing for the examination of witnesses as to their knowledge of violations of the anti-trust law, and declaring that any person subpœnaed and examined shall not be liable to criminal prosecution for any violation of the act about which he may testify, affords to the witness an immunity coextensive with the constitutional privilege that no person shall be a witness against himself, so that he cannot claim the privilege of that provision. Id.

[67] Smith v. State, 14 Okl. Cr. 348, 171 P. 341.

Where a party jointly charged with defendant, but not himself on trial, voluntarily elects to become a witness, he cannot claim on cross-examination any exemptions from answering incriminating questions growing out of the transaction under consideration. Bryan v. State, 11 Okl. Cr. 180, 144 P. 392.

The defendant as a witness is subject to the ordinary rules of evidence. McNeill v. State (Okl. Cr. App.) 192 P. 256.

The privilege does not bar such evidence, but merely gives a right which may be waived if not asserted in ample time. Scribner v. State, 9 Okl. Cr. 465, 132 P. 933, Ann. Cas. 1915B, 381.

[68] State v. Simmons, 98 P. 277, 78 Kan. 852.

Where a prisoner on trial for a crime voluntarily takes the stand, he waives all privileges to which he is entitled by remaining silent, and may be asked if he has not made certain statements inconsistent with his testimony in the cause, and if he admits doing so, he may show the conditions under

this privilege of a witness is personal to the witness, and not available to accused as a basis of objection.[69]

§ 873. Transactions with decedent

"No party to a civil action shall be allowed to testify in his own behalf, in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner or assignee of such deceased person, where such party has acquired title to the cause of action immediately from such deceased person; nor shall the assignor of a thing in action be allowed to testify in behalf of such party concerning any transaction or communication had personally by such assignor with a deceased person in any such case; nor shall such party or assignor be competent to testify to any transaction had personally by such party or assignor with a deceased partner or joint contractor in the absence of his surviving partner or joint contractor, when such surviving partner or joint contractor is an adverse party. If the testimony of a party to the action or proceeding has been taken, and he afterwards die, and the testimony so taken shall be used after his death, in behalf of executors, administrators, heirs at law, next of kin, assignee, surviving partner or joint contractor, the other party, or the assignor, shall be competent to testify as to any and all matters to which the testimony so taken relates." [70]

This statute operates to disqualify such a witness rather than to restrict his testimony as evidence.[71] The word "transaction," within the meaning of this statute, means a matter participated in by the witness and the decedent.[72]

which they were made, and if he denies such statements, the prosecution on rebuttal may prove them, though they would not have been admissible had he remained silent, because not voluntary. Harrold v. Territory, 89 P. 202, 18 Okl. 395, 10 L. R. A. (N. S.) 604, 11 Ann. Cas. 818, judgment reversed 169 F. 47, 94 C. C. A. 415, 17 Ann. Cas. 868.

Under Rev. Laws 1910, §§ 5046, 5881, 5882, where a codefendant avails himself of the privilege given by section 5881, to become a witness, he is a competent witness for all purposes, either for or against himself, or for or against his codefendant. Buxton v. State, 11 Okl. Cr. 85, 143 P. 58.

[69] Castleberry v. State, 139 P. 132, 10 Okl. Cr. 504.

[70] Rev. Laws 1910, § 5049.

[71] Munger v. Myers, 153 P. 497, 96 Kan. 743.

[72] Words and Phrases, vol. 6, pp. 5365, 5366; vol. 8, p. 7061.

This statute should be strictly construed. Sarbach v. Sarbach, 122 P. 1052,

This statute does not prohibit a party to such action from testifying as to any matter relevant to the issues therein, except as to transactions or communications had personally with the deceased.[73]

86 Kan. 894. It applies to the testimony of a widow in a suit against the administrator of her husband's estate. Nance v. Whitten, 51 Okl. 1, 151 P. 567.

In an action on a rejected claim against an estate, plaintiff's testimony as to the transactions involved in such claim had personally with the deceased was properly excluded. Richardson v. Strother, 55 Okl. 348, 155 P. 528.

No party may testify in his own behalf as to transaction with decedent when adverse party is executor, personal representative, heir, next of kin, surviving partner, or assignee of decedent, where party has acquired title to cause of action from decedent. Lindsey v. Goodman, 57 Okl. 408, 157 P. 344.

No party may testify in his own behalf as to any transaction had with a deceased person when the adverse party is the representative of the deceased person. Wadleigh v. Parker, 124 P. 957, 34 Okl. 213.

No party may testify in his own behalf as to any transaction with a deceased person when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner, or assignee of the deceased person, where they have acquired title to the cause of action from such deceased person. MacDonald v. McLaughlin, 123 P. 158, 32 Okl. 584.

In an action by a grantor to set aside a deed against a person who had acquired title immediately from the deceased grantee of such grantor, such grantor could not testify in his own behalf to any transactions or communications with the decedent, whether such transactions or communications were oral or in writing. Conklin v. Yates, 83 P. 910, 16 Okl. 266.

In a suit on a note by an administrator, where defendant pleaded usury, and a statement partly in the handwriting of the decedent was offered in evidence, testimony of defendant that the items shown on the statement represented the usurious transaction and that he paid a usurious rate of interest related to a transaction with the deceased person and was inadmissible. Wadleigh v. Parker, 124 P. 957, 34 Okl. 213.

A Creek freedman allottee is not competent to prove conversation with her grantee, since deceased, to show that her deed was in ratification of former void deeds given during minority. Bell v. Mills, 60 Okl. 72, 158 P. 1173.

Evidence as to the rendition of services for a decedent of such a character as must have been rendered in the presence of decedent and with his knowledge and consent, or at his request, is objectionable. Clifton v. Meuser, 100 P. 645, 79 Kan. 655. A claimant for services in nursing, caring for, and boarding decedent is incompetent to prove the fact of their performance, if, in describing what he did, he necessarily attributes to decedent some act or attitude with respect thereto. Id.

Where, before trial of an action of ejectment by a landlord against a tenant, who, during the tenancy, purchased an outstanding title, defendant died, plaintiff could not testify as to the making of the lease. Cunningham v. Phillips, 44 P. 221, 4 Okl. 169.

It is error to permit a witness to testify as to a conversation with deceas-

[73] Park v. Ensign, 63 P. 280, 10 Kan. App. 173.

Advantage can only be taken by a specific objection at the proper time,[74] and the incompetency of a witness to testify in his own

ed, where witness acquired title or cause of action immediately from such deceased. American Trust Co. v. Chitty, 129 P. 51, 36 Okl. 479.

A party to civil action against administrator is incompetent to testify, in his own behalf, to facts which will raise implied contract between party and decedent. Fuss v. Cocannouer (Okl.) 172 P. 1077; Wallace v. Wallace, 165 P. 838, 101 Kan. 32.

In an action by an alleged heir against his mother, claiming to be widow of testator, and persons claiming under testator's will, to set aside the will, and for partition, where the widow answered, asking the same relief demanded by plaintiff, and the validity of the marriage between testator and the widow was in issue, and the latter was permitted to testify to facts relied on in proof of the marriage, the widow did not, by disclaiming at the close of the evidence all interest in the property in her own behalf, render her testimony competent in behalf of plaintiff. Shorten v. Judd, 42 P. 337, 56 Kan. 43, 54 Am. St. Rep. 587.

Kansas cases.—The statute does not exclude testimony of a witness in such cases whenever a decision for party calling him would inure to his benefit. Collins v. Hayden, 104 Kan. 351, 179 P. 308.

In suit against the executors for services performed for decedent, plaintiff cannot testify as to her services in nursing and caring for him and other personal transactions with him. Heery v. Reed, 102 P. 846, 80 Kan. 380.

Where plaintiff in an action testifies in her own behalf to a certain fact relevant to the issues pending, and on cross-examination admits that her only means of knowledge are the statements of the deceased, whose estate was being sued, such evidence is incompetent. Moyer v. Knapp, 59 P. 674, 9 Kan. App. 226.

Where the original payee of a note brings an action thereon against the administratrix of the maker, he is incompetent to testify that he saw the maker sign it, when the execution of the same was a part of a trade between the maker and himself; but when the execution of the note is established fully by other and competent evidence, the error in permitting plaintiff to testify is not reversible. Bryant v. Stainbrook, 19 P. 917, 40 Kan. 356.

A father gave each of two sons a tract of land, on one of which tracts was a mortgage, and to equalize the gifts it was claimed it was agreed each son should pay one-half the mortgage. Before the debt was paid, the son whose land was free from the mortgage died, and the other son sued the decedent's administrator to recover half the mortgage debt. Held, that the plaintiff was incompetent to testify to an agreement made personally between himself and his deceased brother and their father, by which the deceased brother undertook to pay one-half of the mortgage debt on the land conveyed to the plaintiff, and also as to transactions had personally with such deceased brother. Miller v. McDowell, 64 P. 980, 63 Kan. 75.

In an action against an administrator on a note executed by his decedent,

[74] Where plaintiff took defendant's deposition and required him to testify as to transactions with persons since deceased, he waived his right to object at the subsequent trial that defendant was incompetent to testify as to such transaction, though the deposition was never filed. Cox v. Gettys, 53 Okl. 58, 156 P. 892.

behalf as to a transaction with a deceased person must be raised by objection to the competency of the witness, and not merely by objection to the competency of the evidence offered.[75]

plaintiff's testimony that, on his own knowledge, decedent had made payments preventing the bar of limitations, was not inadmissible, where it did not appear affirmatively that the witness' knowledge had come to him through any transaction or communication had by him personally with the decedent. Crebbin v. Jarvis, 67 P. 531, 64 Kan. 885.

A widow's testimony that she signed a deed under threats of her husband, and that from what had happened she feared there would be more trouble, held not incompetent. Watts v. Myers, 145 P. 827, 93 Kan. 824.

In a suit by a husband to quiet title to property of his deceased wife against her children, both parties claiming to inherit from her, he is prohibited from testifying to transactions and communications had personally with her. Dennis v. Perkins, 129 P. 165, 88 Kan. 428, 43 L. R. A. (N. S.) 1219.

The surviving husband was incompetent to testify to a conversation with his wife, since deceased, by which he claimed that the postnuptial contract between them, that he should take nothing of her estate, had been abrogated. Eberhart v. Rath, 131 P. 604, 89 Kan. 329, Ann. Cas. 1915A, 268.

The statute does not apply where the adverse party claims as beneficiary of a mutual benefit certificate to such decedent, since the beneficiary in the certificate is not the assignee of the member to whom it was issued, and the fact that the beneficiary is in fact his heir or next of kin is not material where his claim is not founded on that relationship. Savage v. Modern Woodmen of America, 113 P. 802, 84 Kan. 63, 33 L. R. A. (N. S.) 773.

In an action by the assignee of an administrator to enforce a chattel mortgage against one who had the mortgaged property sold under execution and had retained the proceeds, in which the mortgagors were made parties in order to reform the mortgage, one of the mortgagors was not an incompetent witness. John T. Stewart's Estate, Inc., v. Falkenberg, 109 P. 170, 82 Kan. 576.

Plaintiff's testimony that deceased had made payments to him on the note in suit and that plaintiff had indorsed payments on the note held inadmissible. Brock v. Corbin, 146 P. 1150, 94 Kan. 542.

Where defendant, in an action in ejectment, claims title through an executor's sale of a deceased's real estate, he is not the assignee of such decedent, so that plaintiffs, though they claim title immediately from such decedent, are not incompetent under such section to testify as to transactions with decedent concerning matters in controversy. Powers v. Scharling, 81 P. 479, 71 Kan. 716.

When a receiver, in obedience to an order of court, turns over the residu-

---

[75] Williams v. Joins, 126 P. 1013, 34 Okl. 733.

The statute makes the witness incompetent, not the evidence; and hence an objection that evidence is incompetent, within such statute, will not reach the incompetency of the witness. Crebbin v. Jarvis, 67 P. 531, 64 Kan. 885.

Where plaintiffs were seeking to keep out incompetent testimony, and not to use disqualified witnesses, rule that incompetency of witness is waived by cross-examining him in respect to transactions with decedent as to new matter does not apply. Randall v. Randall, 101 Kan. 341, 166 P. 516.

Testimony of a party in an action against an administrator or executor where it contains no communication or transaction with decedent is not incompetent.[76]

ary assets of the receivership to a trustee for the interested parties, such trustee does not become an assignee, within the meaning of Code Civ. Proc. § 333, so as to disqualify a witness from testifying in his own behalf, and against the trustee, after the death of the receiver, to transactions had personally with him during his lifetime, concerning the transferred assets. Pulsifer v. Arbuthnot, 53 P. 70, 59 Kan. 380.

All the parties claiming title to certain real estate directly from an ancestor, as heirs, evidence of the defendants as to communications had personally with him was inadmissible. Renz v. Drury, 45 P. 71, 57 Kan. 84.

Plaintiff, seeking to redeem land from a tax deed, had received a deed for the land when a child, and testified that his grantor, for him, accepted an offer of a subsequent grantee in the tax deed to pay the taxes for the use of the land. Defendant held by quitclaim from the grantee in the tax deed. Held that, as neither party was executor, administrator, heir at law, or next of kin of the deceased grantor, the evidence was competent. Kington v. Ewart, 116 P. 495, 85 Kan. 292.

A party to an action may testify in respect to transactions or communications had by him with a deceased person, where the adverse party is not the executor, administrator, heir at law, next of kin, surviving partner, or as-

---

[76] Harper v. Harper, 113 P. 300, 83 Kan. 761.

A daughter prosecuting a claim against the estate of a mother can testify to conversations between her mother and a third person in the presence and hearing of the witness. Griffith v. Robertson, 85 P. 748, 73 Kan. 666.

Admission of defendant's testimony in an action of conversion that she had in her possession for a certain period of time the bank books of deceased, held not violative of statute restricting the admissibility of evidence of transactions with a person since deceased. Manning v. Maytubby, 141 P. 781, 42 Okl. 414.

Defendant's testimony as to a conversation between a deceased person and a stranger, heard by defendant, but in which he did not participate, was admissible, as it did not come within statutory prohibition of evidence as to transactions with decedents. State Bank of Downs v. Abbott, 104 Kan. 344, 179 P. 326.

The fact that the declarations made by an engineer after his injury, as to the cause of the accident resulting in his death, were made to the superintendent of the defendant company, does not render him incompetent to prove them in behalf of the company. Walker v. Brantner, 52 P. 80, 59 Kan. 117, 68 Am. St. Rep. 344.

A party to the record is not necessarily incompetent to testify to transactions as between deceased and his co-defendant, where he took no part therein. Eddy v. O'Brien, 57 P. 244, 9 Kan. App. 882.

When it is alleged that a deed was procured by the undue influence of a son upon his mother, since deceased, he may state whether at any time he requested her to make such deed, where the manifest object of the question is to show that he did not. Coblentz v. Putifer, 125 P. 30, 87 Kan. 719, 42 L. R. A. (N. S.) 298.

A denial by a witness that he delivered to the deceased in her lifetime a certain deed was not evidence of the transaction with the decedent, but a mere denial that a transaction was had.[77]

signee of such deceased person, and where the title to the cause of action was not acquired immediately from him. Reville v. Dubach, 57 P. 522, 60 Kan. 572.

In action against heir for specific performance of deceased's oral contract to devise property, plaintiff's testimony that she had had such an agreement with deceased, and as to unpaid services rendered to deceased, was incompetent. James v. Lane, 103 Kan. 540, 175 P. 387.

Where the party on one side of a controversy is the executor, administrator, heir at law, or next of kin of the decedent, and has acquired title directly through said deceased person, the adverse party is incompetent to testify to any transaction or communication with the decedent. Roach v. Roach, 77 P. 108, 69 Kan. 522.

Under Laws 1911, c. 229, in action by assignee and quitclaim grantee of purchaser of real property against administratrix and heirs of vendor, original purchaser is incompetent to testify as to any transaction or communication had personally with decedent. Gilmore v. Hoskinson, 157 P. 426, 98 Kan. 86.

That testimony inadmissible concerning communications with persons since deceased was offered on the issue of decedent's mental capacity held not to render it competent. Brown v. Brown, 152 P. 646, 96 Kan. 510.

In an action upon contract to devise property, in which defendant testified that he had never heard of such contract before the action, plaintiff in rebuttal might testify to conversations with defendant in which conversation with deceased was detailed. Harris v. Morrison, 163 P. 1062, 100 Kan. 157.

A witness, incompetent may testify as to his conversation with another witness who in behalf of personal representative of decedent has testified to the conversation, although the incompetent witness therein detailed his personal transaction with decedent. Wallace v. Wallace, 165 P. 838, 101 Kan. 32.

The words "adverse party" are not limited to the adverse positions of plaintiff and defendant, but affect any party, whether plaintiff or defendant, whose interests are actually adverse to those of another party to the action, who appears in the capacity of executor, administrator, heir at law, next of kin, surviving partner, or assignee, where the latter has acquired title to the cause of action immediately from a deceased person. American Inv. Co. v. Coulter, 61 P. 820, 8 Kan. App. 841.

Where Code Civ. Proc. § 320, forbids parol evidence of transactions with deceased persons, proof thereof need not fail, but may be established by circumstantial or other competent evidence. Davis v. Sim, 163 P. 622, 100 Kan. 66.

Testimony that a decedent approved of parol gift of land to defendants held incompetent. Cook v. Cook, 161 P. 625, 99 Kan. 351.

In an action by heirs against the devisee and executrix to contest a will, the heirs are not competent witnesses to testify in their own behalf concerning communications had personally with the deceased testator. Wehe v. Mood, 75 P. 476, 68 Kan. 373.

A person who is jointly liable upon the obligation sued on by an executor,

[77] Fish v. Poorman, 116 P. 898, 85 Kan. 237.

In a will contest for alleged undue influence, it was proper for those charged with having exercised such influence to testify that they had no transactions with testatrix relating to the will.[78]

In an action by an administrator, defendants, if otherwise qualified, may testify as to the mental capacity of the deceased at the time the contract is claimed to have been made.[79]

In a suit attacking a will, testimony of a devisee that he had no communication with testatrix is not rendered inadmissible by a statute which forbids testimony by a devisee in his own behalf in regard to a communication had with testatrix.[80]

The incompetency of a witness to testify as to transactions or communications had with a decedent may be waived in certain cases by the acts of the opposite party.[81]

The incompetency of a witness to testify to transactions with a person since deceased is waived, where the objecting party shows on cross-examination that the transaction occurred.[82]

Facts which constitute fraud on the part of a decedent necessarily include personal transactions with such decedent.[83]

Witnesses who are not parties to the suit or controversy are com-

and has a separate suit pending to determine the extent thereof, cannot testify in relation to conversations had by him with the deceased in relation to the matter in controversy. Park v. Ensign, 63 P. 280, 10 Kan. App. 173.

In action between children of decedent for partition depending on her delivery of certain deeds, testimony of defendant that decedent had given her deed was properly stricken because of witness' incompetency to testify thereto. Randall v. Randall, 101 Kan. 341, 166 P. 516.

[78] Kerr v. Kerr, 116 P. 880, 85 Kan. 460.

[79] Grimshaw v. Kent, 73 P. 92, 67 Kan. 463.

[80] Gaston v. Gaston, 109 P. 777, 83 Kan. 215.

[81] The issue being whether a deed from a parent to a child was made as an advancement, a statement by the grantee as a witness that no consideration was paid for it is testimony as to the transaction between him and the grantor, and, if brought out by questions of his opponent, qualifies him to relate all the attendant circumstances, though he would otherwise be incompetent to do so because the evidence related to personal transactions with a person since deceased. Plowman v. Nicholson, 105 P. 692, 81 Kan. 210, judgment affirmed on rehearing Plowman v. Same, 106 P. 279, 81 Kan. 210.

[82] Poole v. Poole, 150 P. 592, 96 Kan. 84, Ann. Cas. 1918B, 929.

The incompetency of a witness to testify as to transactions or communications had with one since deceased is waived, where the objecting party on cross-examination elicits testimony as to such transactions, or shows that such transactions occurred. Conwill v. Eldridge (Okl.) 177 P. 79.

[83] Conklin v. Yates, 83 P. 910, 16 Okl. 266.

petent to testify to conversations with a decedent; and this is true, though the witness be interested in the outcome.[84]

The statute does not prohibit a person from testifying in a case between others as to transactions and communications with a dece-

[84] In action to set aside will, lawyer who drew it may testify to conversation had with testator at the time. Durant v. Whitcher, 156 P. 739, 97 Kan. 603.

In action by one to whom decedent had contracted to leave his property against executor and beneficiary under will, plaintiff's husband, not a party to action, was a competent witness to prove the alleged contract, though husband and wife occupied part of disputed land as homestead. Harris v. Morrison, 163 P. 1062, 100 Kan. 157.

Rev. Laws 1910, § 5049, held not to render incompetent a conversation had with a person since deceased by plaintiff's agent and manager, where such agent was not a party to the action or interested in it. First Nat. Bank of El Reno v. Davidson-Case Lumber Co., 52 Okl. 695, 153 P. 836.

In action by administrator, widow and stepdaughter of deceased, neither being party to action, are competent to testify to transactions had personally by defendant with deceased. Alexander v. Bobier (Okl.) 166 P. 716.

On a petition by administratrix of a partner for directions whether to treat decedent's real estate as individual or partnership property, in which various creditors were parties, and also decedent's brother, who was the surviving partner, the brother was not incompetent to testify to transactions with decedent, over objection of a creditor. Sarbach v. Sarbach, 122 P. 1052, 86 Kan. 894.

Plaintiff, suing to recover land claimed as being the wife of the decedent, where defendants are the grandchildren and great-grandchildren of the decedent who acquire their interest through the daughter of the decedent, is not prohibited from testifying to transactions personally had with the decedent, as the parties adverse did not acquire their title immediately from the decedent. Williams v. Campbell, 113 P. 800, 84 Kan. 46, judgment affirmed on rehearing 118 P. 1074, 85 Kan. 631.

Testimony of a maker of a note, not made a party in a suit thereon, that he was the principal and defendant a surety, and that the deceased payee had, for a valuable consideration and without the knowledge of the surety, extended the time of the payment thereof, is admissible. Koger v. Armstrong, 83 P. 1029, 72 Kan. 691.

The fact that a witness was a party to an action to which the representatives of a decedent were parties did not preclude him from testifying as to matters occurring in decedent's lifetime, where he had no interest in the subject-matter of the suit, and made a disclaimer. Murphy v. Colton, 44 P. 208, 4 Okl. 181.

A father gave each of two sons a tract of land, on one of which tracts was a mortgage, and in order to equalize the gifts it was claimed that it was agreed each son should pay one-half of the mortgage. Before the debt was paid, the son whose land was free from incumbrance died, and the other son sued the decedent's administrator to recover half the mortgage debt. Held, that the mother, who joined the father in the conveyance not being an assignor of the thing in action, was not precluded from testifying as to the

dent from whom the parties claim title.[85] It does not prohibit proof of transactions and communications had personally between a party to the suit and the deceased grantee of such person by disinterested witnesses or other competent evidence, other than that of a party to the suit.[86]

The word "party" within the Code provision prohibiting a party from testifying concerning personal transactions and communications with a person since deceased, does not include one not technically a party to the action, however much he may be interested in the result thereof.[87]

A party to an action may testify to conversations occurring in his presence between deceased persons, where the opposite party claims as heir of one of such deceased persons.[88]

The statutory provisions relating to testimony as to transactions or communications with a decedent do not apply where the transaction or communication was not between the witness and the deceased person, but was between the latter and a third party, and

agreement with reference to the mortgage debt. Miller v. McDowell, 64 P. 980, 63 Kan. 75.

Neither a sheriff levying an attachment on personalty nor the attachment creditor is an "assignee" of the attachment debtor; and hence a vendee of a deceased attachment debtor may, in an action by him against the sheriff and the attaching creditor for conversion of the property, testify in his own behalf to the transaction whereby he claims title from decedent. Burlington Nat. Bank v. Beard, 42 P. 320, 55 Kan. 773.

An objection to the introduction of the stenographer's transcript of testimony of a deceased grantor as incompetent was properly overruled. New v. Smith, 145 P. 880, 94 Kan. 6, L. R. A. 1915F, 771, Ann. Cas. 1917B, 362.

[85] Hess v. Hartwig, 132 P. 148, 89 Kan. 599.

[86] Conklin v. Yates, 83 P. 910, 16 Okl. 266.

It does not apply to an agent of a party to the action, such agent not being a party to the action, nor having any legal interest in the result of it. Carroll v. Chipman, 57 P. 979, 8 Kan. App. 820.

[87] Hess v. Hartwig, 112 P. 99, 83 Kan. 592.

In suit on note and to foreclose mortgage, plaintiff's testimony, transactions with a decedent, as to execution of note and mortgage, was admissible, where he was neither executor, administrator, heir at law, next of kin, surviving partner, nor assignee of deceased. Phinnie v. Atkinson (Okl.) 177 P. 111.

That witness might be interested in outcome of suit does not render her incompetent. Alexander v. Bobier (Okl.) 166 P. 716.

Nor does it exclude the officers of a corporation which may be a party, or other interested persons not parties to the action. Mendenhall v. School Dist. No. 83, Jewell County, 90 P. 773, 76 Kan. 173.

[88] Page v. Sawyer, 101 Kan. 612, 168 P. 878.

was not taken part in by the witness.[89] So, too, the letters of a deceased do not come within the prohibitions of the Code.[90]

§ 874. Witness privileged from being sued

"A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county, while going, returning or attending, in obedience to a subpœna." [91]

[89] Fry v. Fry, 43 P. 235, 56 Kan. 291.

[90] Letters written by a person since deceased to his son, who is seeking to recover property deeded by his father to another, held admissible to show mental capacity of deceased when they were written and the deed executed. Munger v. Myers, 153 P. 497, 96 Kan. 743.

In action to enforce promise of decedent to devise property to plaintiffs, testimony as to the receipt of letters, which in the opinion of the witness were in the handwriting of decedent, held not objectionable as stating a personal transaction with decedent. Dillon v. Gray, 123 P. 878, 87 Kan. 129.

The statute has no application to the admissibility in evidence, in an action to establish a resulting trust, of a letter written by defendants' intestate to plaintiff, wherein he stated that he held the real estate in question as her agent. Garten v. Trobridge, 104 P. 1067, 80 Kan. 720.

In an action by an administrator to recover money lent to defendant by decedent, testimony by defendant that money for payment of the debt was inclosed in an envelope, taken to the post office, and that certain steps were there taken to have the postmaster register the letter and send it to decedent in a distant state, and also that in due time defendant received a writing acknowledging receipt of the money, which writing was identified and introduced in evidence was not incompetent. Bryan v. Palmer, 111 P. 443, 83 Kan. 298, 21 Ann. Cas. 1214.

[91] Rev. Laws 1910, § 5064.

Where one of the parties to an action is an heir of a deceased person, who claims that the title to the land in controversy was transferred to his ancestor by the adverse party, such adverse party may testify that he had no transaction personally with the deceased, and that no transfer of title was ever made by him to the deceased. Murphy v. Hindman, 48 P. 850, 58 Kan. 184.

ARTICLE IV

CREDIBILITY AND IMPEACHMENT

Sections

875. Credibility.
876. Corroboration.
877. Impeachment.
878. Impeaching own witness.
879. Character and conduct of witness.
880. Reputation—Place and time of acquiring.
881. Particular facts.
882. Conviction of crime.
883. Cross-examination to test reliability or to discredit.
884. Conduct in reference to the case.
885. Inconsistent statements.
886. Contradicting witness.
887. Prior corroborating statements.
888. Sustaining evidence.

§ 875. Credibility

A witness may be examined as to occupation, social connections, and manner of living to affect his credibility.[92]

The jury are the exclusive judges of the credibility of witnesses and the weight of the evidence, and the value to be given to their testimony, and they may, if they think proper, reject the whole of the testimony of such witness, who they may find has willfully testified falsely to a material fact, or may give it such weight where it has been corroborated by credible evidence as they may deem it entitled to have.[93]

[92] Musgraves v. State, 106 P. 544, 3 Okl. Cr. 421.

[93] Henry v. State, 119 P. 278, 6 Okl. Cr. 430.

Jury is sole judge of credibility of witnesses, and whether witness has interest in outcome of trial is proper to be elicited for jury's consideration. Jones v. State, 15 Okl. Cr. 547, 179 P. 619.

An instruction that, if the jury believed that any witness has willfully testified falsely in a material matter, they may disregard his entire testimony, need not make an exception in favor of such portion thereof as is corroborated. Robert Burgess & Son v. Alcorn, 90 P. 239, 75 Kan. 735.

An instruction that if the jury believe a witness has sworn falsely, they may reject his testimony or any part of it, is erroneous; as, unless the testimony was willfully false, it is no ground for disregarding the entire testimony of the witness. Barney v. Dudley, 19 P. 550, 40 Kan. 247.

The fact that a person may voluntarily come from another state and without process appear and testify in court does not impair his competency as a witness, nor necessarily deprive his testimony of probative force. Timma v. Timma, 82 P. 481, 72 Kan. 73.

§ 876. Corroboration

Where no attack is made upon the credibility of a witness his prior statements are inadmissible.[94]

On a trial to a jury, where the defendant testifies in his own behalf and is not impeached, it is reversible error to permit him to introduce evidence of his general reputation for truth and veracity.[95]

§ 877. Impeachment

Where a person does not testify at the trial, his reputation for truth cannot be made an issue of the cause.[96]

A notary public is a ministerial officer, and his evidence is competent to impeach his certificate.[97]

§ 878. —— Impeaching own witness

The rule that a litigant cannot impeach his own witnesses usually forbids his attempt to impeach a witness whom he himself first uses, though the witness is afterwards called to testify on behalf of the adverse party.[98]

The court may, however, in its discretion, in the interest of truth and justice, permit a party to impeach his own witness.[99]

[94] Jones v. State, 9 Okl. Cr. 646, 133 P. 249, 48 L. R. A. (N. S.) 204.

[95] First Nat. Bank v. Blakeman, 91 P. 868, 19 Okl. 106, 12 L. R. A. (N. S.) 364.

[96] State v. Chenute, 70 P. 870, 65 Kan. 862.

[97] Effenberger v. Durant, 57 Okl. 445, 156 P. 212.

[98] Johnston v. Marriage, 86 P. 461, 74 Kan. 208, rehearing denied 87 P. 74, 74 Kan. 208; McCauley v. Custer, 143 P. 489, 93 Kan. 27.

A party introducing a witness in his behalf cannot impeach his character for truth and veracity. National Surety Co. v. Oklahoma Nat. Life Ins. Co. (Okl.) 165 P. 161.

A party offering a witness should not be permitted to discredit his testimony, but, when the testimony is in the nature of conclusions, it is the duty of the court to say what facts are established thereby. Wass v. Tennent-Stribbling Shoe Co., 41 P. 339, 3 Okl. 152. A party cannot impeach his own witness by showing his general bad character for truthfulness. Sturgis v. State, 102 P. 57, 2 Okl. Cr. 362. Nor can a party placing a witness on the stand, with notice that he will testify adversely, claim surprise and be permitted to impeach him. Id.

In a criminal case the state cannot impeach the general character for truth and veracity of one of its own witnesses. State v. Keefe, 38 P. 302, 54 Kan. 197.

[99] Nuzum v. Springer, 156 P. 704, 97 Kan. 744.

The question as to whether a party may impeach his own witness is largely within the sound judicial discretion of the trial court; and a slight error

Where a witness has been called by all the parties to the action, cross-examination which tends to impeach him is within trial court's sound judicial discretion.[1]

Where witnesses give testimony contrary to former testimony and inconsistent with previous statements, the party calling them may cross-examine and call attention to former evidence and statements and offer testimony impeaching the present testimony.[2]

Where a judgment pleaded and offered in evidence as res judicata, on its face shows the items on which it was rendered, the party who relies on it cannot contradict it, and show that it was rendered on items different from those set out.[3]

§ 879. —— Character and conduct of witness

The truthfulness of a witness cannot be impeached by proof of general bad character for morality;[4] or by proof of specific acts showing want of morality;[5] or by testimony as to general reputation for virtue and chastity.[6] A party is not entitled to show that a witness entertains a disbelief of the existence of God for the purpose of discrediting his testimony.[7]

Where plaintiff testified in his own behalf, proof of base, dishonorable, or criminal conduct on his part is admissible to discredit him as a witness and to throw suspicion upon his cause of action.[8]

Testimony as to the general character of a witness offered to impeach him must be as to his reputation for truth, and testimony as to his reputation for being a bootlegger is incompetent.[9]

in such a matter, where the testimony of the witness is of small importance, is not ground for reversal. St. Louis & S. F. Ry. Co. v. Weaver, 11 P. 408, 35 Kan. 412, 57 Am. Rep. 176.

It was discretionary with the court to permit the state to prove that a witness for the state was drunk at a certain time about which he testified both on direct and on cross examination. State v. Alexander, 131 P. 139, 89 Kan. 422.

1 Avery v. Howell, 171 P. 628, 102 Kan. 527.
2 State v. Terry, 161 P. 905, 98 Kan. 796.
3 Guttermann v. Schroeder, 20 P. 230, 40 Kan. 507.
4 Litchfield v. State, 126 P. 707, 8 Okl. Cr. 164, 45 L. R. A. (N. S.) 153.
5 Litchfield v. State, 126 P. 707, 8 Okl. Cr. 164, 45 L. R. A. (N. S.) 153.
6 Kennedy v. Pawnee Trust Co., 126 P. 548, 34 Okl. 140.
7 Dickinson v. Beal, 62 P. 724, 10 Kan. App. 233.
8 St. Louis & S. F. R. Co. v. Walker, 122 P. 492, 31 Okl. 494.
9 Upton v. State, 12 Okl. Cr. 593, 160 P. 1134.

§ 880. —— Reputation—Place and time of acquiring

Where the purpose of testimony is to impeach a witness for truth and veracity, the inquiry must be as to his general character or reputation for truth and veracity in the community in which he resides.[10]

[10] Richards v. State, 12 Okl. Cr. 224, 154 P. 72.

That witnesses have a reputation in the vicinity of their residence for untruthfulness may be shown for purposes of impeachment. Stevens v. Blake, 48 P. 888, 5 Kan. App. 124.

Under the common law, made applicable by the statute, testimony to impeach a witness for want of veracity must be confined to his general character or reputation therefor where he resides. Kirk v. State, 11 Okl. Cr. 203, 145 P. 307; Rev. Laws 1910, § 5543.

A witness, who had lived for many years in another state, had removed to his place of residence at the time of the trial only a few months previous thereto. Held, that evidence as to his reputation for truth and veracity in the place of his former residence was competent to impeach him. Coates v. Sulau, 26 P. 720, 46 Kan. 341.

Where the prosecutrix has recently lived in the neighborhood of the witness, which is about five miles from her own home, and is generally acquainted in that neighborhood, and such witness knows the general reputation of the prosecutrix for chastity in such neighborhood, but does not know her general reputation for chastity in the particular neighborhood in which she resides at the time of the trial, such witness may be permitted to give evidence of her general reputation for chastity in his neighborhood. The means and extent of the witness' knowledge under the circumstances are matters which affect the credibility, but not necessarily the competency, of the witness. State v. Bryan, 8 P. 260, 34 Kan. 63.

A person who states that he is not much acquainted with the general reputation for veracity of a witness in the community where he lived, and that he cannot say exactly what his reputation is, is not competent to testify as to his reputation. Redden v. Tefft, 29 P. 157, 48 Kan. 302.

Where a defendant, on trial for larceny, introduced evidence to establish his good character for honesty, it was error to permit witnesses on behalf of the state to testify in rebuttal that the accused, together with three other persons not on trial, sustained bad reputations in that respect, since the reputation of such other persons was not in issue, and the testimony imported a collateral issue into the case. State v. Beaty, 62 P. 658, 62 Kan. 266.

In a prosecution for larceny, it was not error to exclude questions asked witnesses tending to show that certain relatives of the prosecuting witness had been convicted of crime and sentenced to the penitentiary. State v. Tawney, 112 P. 161, 83 Kan. 603.

A witness, who stated that he knew, relative to the character of the prosecutrix, only what he had heard from several families with whom she had lived, and that he had no knowledge of her general reputation, held incompetent to testify as to her general reputation for truthfulness. State v. Evans, 136 P. 270, 90 Kan. 795, judgment affirmed on rehearing 140 P. 892, 92 Kan. 468.

A person who had known a witness 20 years and lived near her a large

It is competent to ask an impeaching witness, who has testified that the general reputation of another witness for truth and veracity in the vicinity in which he lives is bad, whether he would give him full credit upon his oath.[11]

§ 881. —— Particular facts

The previous occupation, companions, and associates of a witness are proper subjects of inquiry for the purpose of affecting his credibility.[12] He may be cross-examined as to specific facts tending to disgrace or degrade him, although collateral to the main issue, and touching on matters of record.[13]

Proof of disreputable conduct of a witness should be allowed only in the exercise of a sound judicial discretion.[14]

The state may show on cross-examination the relations between a witness and accused, so far as such relation would tend to show bias affecting his credibility, though prejudice to defendant might result therefrom.[15]

An examination for the purpose of impeachment must not question accused's violation of any specific law.[16]

A man and his wife, prosecuting witnesses, cannot be compelled

portion of the time, though living ten miles distant at the time of the trial, is competent to testify to her reputation for truth. State v. Ball, 144 P. 1012, 93 Kan. 606.

[11] State v. Johnson, 19 P. 749, 40 Kan. 266.

[12] Terry v. State, 122 P. 559, 7 Okl. Cr. 430.

While it is improper to impeach a witness by showing that he has been indicted, arrested, or imprisoned for crime before conviction, yet his occupation and companions may be shown, when they indicate a want of moral character. Crawford v. Ferguson, 115 P. 278, 5 Okl. Cr. 377, 45 L. R. A. (N. S.) 519.

On cross-examination of a witness to affect his credibility, questions as to his social connections and manner of living, or which tend to explain, contradict, or discredit his testimony in chief, to show his conviction of crime, are admissible. Murphy v. State, 15 Okl. Cr. 312, 176 P. 417.

[13] State v. Greenburg, 53 P. 61, 59 Kan. 404.

For the purpose of impairing his credibility, a witness who gives material evidence may be cross-examined as to his past conduct and character, and as to specific acts tending to discredit him. State v. Abbott, 69 P. 160, 65 Kan. 139.

[14] Castleberry v. State, 139 P. 132, 10 Okl. Cr. 504.

Evidence as to arrest of a witness for immoral acts with a woman in a rooming house cannot be properly put in evidence to discredit such witness. National Surety Co. v. Oklahoma Nat. Life Ins. Co. (Okl.) 165 P. 161.

[15] Daggs v. State, 12 Okl. Cr. 289, 155 P. 489.

[16] Sims v. State, 11 Okl. Cr. 382, 146 P. 914.

on cross-examination to answer questions as to their marriage, to affect their credibility.[17]

§ 882. —— Conviction of crime

To test the credibility of a witness he may be asked on cross-examination as to his having been convicted of any crime;[18] but it is improper to ask a witness, to affect his credibility, whether he has ever been indicted or arrested or imprisoned for crime.[19]

Where a witness has been cross-examined as to a conviction of a felony, the court may require him to state of what felony he has been convicted.[20]

[17] Flohr v. Territory, 78 P. 565, 14 Okl. 477.

[18] Davis v. State, 15 Okl. Cr. 386, 177 P. 621; Murphy v. State, 15 Okl. Cr. 312, 176 P. 417.

Under Rev. Laws 1910, § 5046, a witness upon cross-examination may be asked whether he has ever been convicted of felony or a crime involving moral turpitude in order to affect his credibility. Chase v. Cable Co. (Okl.) 170 P. 1172.

In ejectment, held not error to permit a witness to be asked whether he had ever been convicted of a crime in the tribal courts of the Seminole Nation. Perkins v. Baker, 137 P. 661, 41 Okl. 288.

It is competent to ask a witness if he has been convicted of violating the prohibition laws. Missouri, K. & T. Ry. Co. v. Johnson, 126 P. 567, 34 Okl. 582.

In a prosecution for perjury alleged to have been committed in a criminal case, it was not error for the state to ask a witness for accused if he too was not under indictment for perjury committed on the same trial. Gray v. State, 111 P. 825, 4 Okl. Cr. 292, 32 L. R. A. (N. S.) 142.

That a witness has been convicted of bootlegging may be shown to impeach his credibility. Fowler v. State, 126 P. 831, 8 Okl. Cr. 130; Crawford v. Ferguson, 115 P. 278, 5 Okl. Cr. 377, 45 L. R. A. (N. S.) 519.

[19] Musgraves v. State, 106 P. 544, 3 Okl. Cr. 421.

It is improper to ask a witness on cross-examination "if he has not been arrested and confined in jail for a crime." Files v. State, 16 Okl. Cr. 363, 182 P. 911.

It is improper to ask a witness if he has ever been indicted or imprisoned before conviction for any offense whatever. Porter v. State, 126 P. 699, 8 Okl. Cr. 64.

For the purpose of impeaching the credibility of a witness, he may be asked on cross-examination if he has been convicted of a felony or any crime involving a want of moral character, but it is improper to ask him if he has been indicted, arrested, or imprisoned before the conviction of said witness for any offense whatever. Price v. United States, 97 P. 1056, 1 Okl. Cr. 291; Slater v. United States, 98 P. 110, 1 Okl. Cr. 275; White v. State, 111 P. 1010, 4 Okl. Cr. 143; Hendrix v. State, 113 P. 244, 4 Okl. Cr. 611; Nelson v. State, 106 P. 647, 3 Okl. Cr. 468; Caples v. State, 104 P. 493, 3 Okl. Cr. 72, 26 L. R. A. (N. S.) 1033; Keys v. United States, 103 P. 874, 2 Okl. Cr. 647.

[20] McDaniel v. State, 127 P. 358, 8 Okl. Cr. 209.

Where evidence of a witness' conviction in a foreign state has been admitted, it is not error to exclude facts relating to the conviction, but offered to contradict the witness' testimony as to the facts on which the conviction was had.[21]

Where a defendant is witness for himself, he may be asked whether he has been convicted of a felony or offense showing want of moral character to affect his credibility as a witness, though an appeal is pending from the conviction in question.[22]

Proof of defendant's prior conviction to affect his credibility may be made either by record, or by his cross-examination, as to other separate offenses limited to proof of the offense charged and to matters pertinent to the issue.[23]

§ 883. ——, Cross-examination to test reliability or to discredit

The scope of cross-examination as to the past conduct of a witness, to discredit him, is largely discretionary.[24]

On cross-examination a witness may be asked any question

[21] Parker v. Hamilton, 49 Okl. 693, 154 P. 65.

[22] Manning v. State, 123 P. 1029, 7 Okl. Cr. 367.

Under Rev. Laws 1910, § 5046, providing that a witness may be discredited by showing his conviction of a criminal offense, an accused who testifies in his own behalf may be asked on cross-examination whether he has been convicted of a particular crime. Key v. State, 10 Okl. Cr. 206, 135 P. 950.

A defendant in a criminal prosecution who voluntarily becomes a witness in his own behalf is subject to the same rule as any other witness, and may be asked by the state, on cross-examination, if he had not been convicted of larceny at the previous term of the same court in which he was being tried. State v. Probasco, 26 P. 749, 46 Kan. 310, following Same v. Pfefferle, 12 P. 406, 36 Kan. 90.

[23] Smith v. State, 14 Okl. Cr. 348, 171 P. 341.

To affect the credibility of a witness for plaintiffs, defendants may introduce an authenticated record showing a conviction for felony of a person of the same name as the witness without other proof of identity. Bayha v. Mumford, 49 P. 601, 58 Kan. 445.

[24] State v. Moberly, 136 P. 324, 90 Kan. 837; Cockrill v. Missouri, K. & T. Ry. Co., 136 P. 322, 90 Kan. 650.

Refusing to permit a witness who had turned "state's evidence," being charged with the same crime as defendant, to be cross-examined as to whether the case against her had been set down for hearing, and refusing to permit another witness, who had expressed an opinion that the former should not be prosecuted, to be cross-examined as to his reasons therefor, all for the purpose of further showing that an agreement had been made not to prosecute the first-named witness, is not an abuse of the discretion vested in the trial court as to the limit of cross-examination to discredit a witness. State v. Nelson, 52 P. 868, 59 Kan. 776.

Defendant in an action on a note held entitled to cross-examine plaintiff to

the answer to which would tend to test his means of knowledge, his intelligence, or the reliability of his memory.[25]

Where the general reputation of any person is established by the opinions of witnesses as to the general estimate of his character, it is permissible on cross-examination of such witnesses to show the sources of their information, and to call particular facts to their attention, and to ask if they ever heard of them, not to establish the truth of such facts, but to test the credibility of the witnesses, and to ascertain what weight or value is to be given to their testimony.[26]

A witness may be asked, on cross-examination, to test his memory, if he was not drunk at the time referred to.[27] He may be asked to whom, if any one, he told the facts to which he testifies.[28]

It is permissible to inquire into the antecedents of a witness, by showing his vocation, manner of life, etc., when the facts sought to be elicited are pertinent to the issue.[29]

It is improper to ask a witness for the sole purpose of impeachment, if he had married a woman with whom he had committed adultery.[30] He may be required to answer as to his past conduct and character and certain specific acts.[31] He may be asked any

determine the accuracy of his general statement in the nature of a conclusion. Leavens v. Hoover, 145 P. 877, 93 Kan. 661.

[25] Henry v. State, 119 P. 278, 6 Okl. Cr. 430.

Cross-examination of a defendant on trial for murder which tends to discredit his statement on direct is proper. Harding v. State, 16 Okl. Cr. 47, 180 P. 391.

[26] Stouse v. State, 119 P. 271, 6 Okl. Cr. 415.

A witness to good character may be cross-examined as to whether he has heard rumors of specific charges of commission of acts inconsistent with such good character, in order to test his credibility and the weight of his evidence, though such rumors are inadmissible unless confined to time previous to crime charged. Pope v. State, 15 Okl. Cr. 162, 175 P. 727.

[27] State v. Jennings, 121 P. 1131, 86 Kan. 785.

On cross-examination, it is proper to inquire whether the witness was drinking intoxicating liquors at the time or shortly before the occurrence as to which he testifies. Rogers v. State, 127 P. 365, 8 Okl. Cr. 226.

[28] State v. McKinney, 3 P. 356, 31 Kan. 570.

[29] Sights v. State, 13 Okl. Cr. 627, 166 P. 458.

[30] Caples v. State, 104 P. 493, 3 Okl. Cr. 72, 26 L. R. A. (N. S.) 1033; Price v. State, 98 P. 447, 1 Okl. Cr. 358.

[31] Garvin v. Garvin, 123 P. 717, 87 Kan. 97.

A witness may be cross-examined as to his manner of living and his companions, as affecting his credibility. Fowler v. State, 126 P. 831, 8 Okl. Cr.

question tending to impeach his accuracy, memory, veracity, or character, though the matters involved in the question go beyond the scope of the examination in chief.[32]

On cross-examination, it is competent to prove any facts showing bias, friendship, or relationship.[33]

130. A witness may be cross-examined as to his occupation, for the purpose of affecting his credibility. Id.

A witness on cross-examination may be interrogated to impair his credibility concerning his past conduct and character and as to specific acts tending to discredit him, though irrelevant and collateral to the principal controversy. State v. Pugh, 90 P. 242, 75 Kan. 792.

A witness may be cross-examined as to specific acts tending to discredit her, where relevant to the issue. Cannon v. Territory, 99 P. 622, 1 Okl. Cr. 600.

[32] Hopkins v. State, 9 Okl. Cr. 104, 130 P. 1101, Ann. Cas. 1915B, 736.

[33] Gilbert v. State, 129 P. 671, 8 Okl. Cr. 543, denying rehearing 128 P. 1100, 8 Okl. Cr. 543.

On cross-examination a witness may be asked any question the answer to which would tend to test his bias, prejudice, or interest in the case. Henry v. State, 119 P. 278, 6 Okl. Cr. 430.

An attorney testifying as a witness for his client may be asked on cross-examination if he has an interest in the judgment to be recovered as part of his fees to show bias and to affect his credibility. Wallace v. Kopenbrink, 31 Okl. 26, 119 P. 579.

Where a witness though on cross-examination gives testimony adverse to the party cross-examining, showing his interest or bias in the case, or lack of it, such party is not bound to accept the statements of such witness as conclusive, but may offer proof contradictory thereof and tending to establish the existence of facts to the contrary. Gibbons v. Territory, 115 P. 129, 5 Okl. Cr. 212.

In a prosecution for statutory rape, the state, on cross-examination, may show the relations existing between the witness and defendant so far as they might create a bias affecting the witness' credibility, though such evidence would probably prejudice the defendant. Castleberry v. State, 139 P. 132, 10 Okl. Cr. 504.

It is not error on cross-examination to ask a witness for defendant any question reasonably calculated to disclose his interest in the trial, and, where a witness has signed an affidavit for change of venue, the prosecution may ask him in relation thereto. Miller v. Territory, 85 P. 239, 15 Okl. 422, judgment reversed Same v. Territory of Oklahoma, 149 F. 330, 79 C. C. A. 268, 9 Ann. Cas. 389.

It is a general rule that any question may be put to a witness on cross-examination, the answer to which may have a tendency to show bias or prejudice on the part of the witness. State v. Krum, 4 P. 621, 32 Kan. 372.

On cross-examination, an adverse witness may be questioned as to his intimacy with a person whom the party he is testifying against caused to be arrested, if followed by evidence tending to show a conspiracy between witness and such person to furnish evidence. Id.

A witness who admits ill will or prejudice against one of the parties to an

It is proper to allow a searching cross-examination of detectives to show their interest and thereby affect their credibility.[34]

§ 884. —— Conduct in reference to the case

For impeachment purposes, and thereby to throw suspicion on the cause of action, defendant may prove that a witness for plaintiff, in furtherance of the identical cause, has been guilty of base or criminal conduct.[35]

§ 885. Inconsistent statements

Where the proper predicate is laid, for purpose of impeachment, it may be shown that the witness has made statements out of court, contrary to what he has testified at the trial.[36]

action may nevertheless be cross-examined as to the extent and character of that prejudice. State v. Collins, 5 P. 368, 33 Kan. 77.

Accused may bring out on cross-examination of a witness against him, facts showing that the witness' testimony may have been influenced or colored by intimidation or some selfish or personal motive. State v. Tawney, 105 P. 218, 81 Kan. 162, 135 Am. St. Rep. 355.

A witness for defendant, admitting on cross-examination that he had had trouble with plaintiff, growing out of a lawsuit, cannot be asked what judgment plaintiff procured against him, as the inquiry would be of no service in determining hostile feeling. Boldon v. Thompson, 56 P. 131, 60 Kan. 856.

On prosecution for murder, it is competent for accused to show, on cross-examination of witness for the state, that the latter, with others, formed a mob for the purpose of hanging defendant. State v. Hamilton, 69 P. 162, 65 Kan. 183.

Where a witness testified that he was not defendant's agent, but acted independently for himself in purchasing the goods sold by plaintiff, a letter addressed to plaintiff by the witness, containing statements at variance with his testimony, was properly admitted to contradict him. Gregg v. Berkshire, 62 P. 550, 10 Kan. App. 579.

[34] De Graff v. State, 103 P. 538, 2 Okl. Cr. 519.

In a prosecution for a second violation of the prohibitory liquor laws, the refusal to permit defendant, on cross-examination of prosecuting witness to ask if he was not paid to secure evidence in the case, intended to show witnesses' interest, was error. Files v. State, 16 Okl. Cr. 363, 182 P. 911.

Where the testimony for the state was entirely that of two paid detectives, it was error to sustain an objection by the state to a question asked one of the detectives, on cross-examination, concerning the amount paid him by the county attorney for his services. State v. Shew, 57 P. 137, 8 Kan. App. 679.

[35] Taylor v. J. H. Wade & Co., 44 Okl. 294, 144 P. 559.

[36] Kuykendall v. Lambert (Okl.) 173 P. 657; Smith v. State, 108 P. 418, 3 Okl. Cr. 629; State v. Hoerr, 129 P. 153, 88 Kan. 573; State v. King, 102 Kan. 155, 169 P. 557.

On a murder trial, where defendant elects to testify in his own behalf, he may be cross-examined as to admissions voluntarily made that he committed

The exclusion of impeaching testimony as to statements of a witness is proper, where no foundation was laid therefor by asking the witness as to the statements.[37]

the homicide, and, on a denial by him, impeaching testimony may be introduced. Buck v. State, 16 Okl. Cr. 356, 182 P. 913.

Where a witness has stated his opinion as to the value of the services of attorneys, it is error to refuse to permit him to be cross-examined as to any prior statement or conduct inconsistent with or disprobative of such opinion. Colley v. Sapp, 44 Okl. 16, 142 P. 989, judgment affirmed on rehearing 44 Okl. 16, 142 P. 1193.

Where the matter inquired about is relevant to the issue and a witness denies having made a statement material thereto, such statement, if contradictory to his testimony on the trial, may be shown to impeach him. Hartwell v. State, 15 Okl. Cr. 416, 177 P. 383.

In action for wrongful death of an employé, contradictory statements to impeach defendant's foreman and assistant foreman held admissible. Griffith v. Midland Valley R. Co., 100 Kan. 500, 166 P. 467.

Where a witness testifies to the time and circumstances of defendant's appearance at a certain place to show that he was not present when the alleged offense was committed, evidence that the witness had previously stated that he was asleep at the time referred to is admissible, after his attention has been directed to the statement on cross-examination. State v. Swartz, 126 P. 1091, 87 Kan. 852.

At the trial of a criminal action wherein the defendant was charged with having committed rape five times upon the witness between the 1st day of April, 1888, and the 1st day of August, of the same year, and her testimony tended to show that the offenses were committed in the months of February, March, and April, 1887, it was proper to ask on cross-examination if she did not swear before the grand jury that the special offense about which she was

---

[37] Robinson v. State, 130 P. 121, 8 Okl. Cr. 667.

An expert who testified as to the cause of a boiler explosion cannot be impeached by proof that he signed a verdict at the inquest, stating the cause to be unknown, where his attention had not been called thereto. Denver v. Atchison, T. & S. F. R. Co., 150 P. 562, 96 Kan. 154, Ann. Cas. 1917A, 1007.

Before a witness can be impeached by proof of contradictory statements made in his evidence on a former trial, such contradictions must be called to his attention, and it is error to introduce them without having laid any foundation. State v. Cleary, 19 P. 776, 40 Kan. 287.

Before a witness can be impeached by proof of contradictory statements out of court, his attention must be called to the time, place, and person in such a manner that there is a reasonable certainty that his attention will be directed to the alleged conversation. Kuhn v. Poole, 112 P. 962, 27 Okl. 534.

Where, with a view of impeaching a witness, he is asked if he did not make a certain statement on a previous examination, and he replies that "it amounts to about the same thing," he thereby practically admits the making of the statement, and his answer is insufficient as a foundation for impeachment. State v. Baluwin, 12 P. 318, 35 Kan. 1.

A witness cannot be impeached by contradiction upon a collateral matter brought out on cross-examination.[38]

Previous contradictory statements must be confined to a contradiction of the testimony of the witness which is injurious to the impeaching party.[39]

To impeach a witness by evidence of a former statement, the statement must be material to the issues being tried.[40]

Where it is sought to impeach a witness in a criminal case by showing contradictory statements out of court, statements made by

then testifying was perpetrated on the 13th day of April, 1888. State v. Spidle, 22 P. 620, 42 Kan. 441.

Where, in an action by a head brakeman against a railway company for injuries occasioned by a switch stand and the target thereof being too close to the railroad track plaintiff testifies that he had no actual knowledge how close the switch target was to the track prior to his injuries, the exclusion of a question, upon cross-examination, whether after the injury he did not state that he had "repeatedly called the attention of parties to that target," is error. Southern Kansas Ry. Co. v. Michaels, 30 P. 408, 49 Kan. 388.

A witness could be asked on cross-examination whether he had not made statements conflicting with his testimony. State v. Zimmerman, 42 P. 828, 3 Kan. App. 172. Defendant was prosecuted for assault on the ground that his sons committed the offense in his presence, with his consent. Held, that a witness for the defense, who testified solely as to the details of a trip taken by himself and defendant on the day of the assault to another town, could not, on cross-examination, be asked whether he had not told a certain party that his brother had told witness that he, the speaker, and defendant, witnessed the assault. Id.

That a witness testified he had no recollection of a conversation with plaintiff as to statements of defendant, but, if he had such conversation, what he said was true, held not to render competent plaintiff's testimony as to what the forgotten statement was. Mallinger v. Sarbach, 146 P. 1148, 94 Kan. 504.

[38] State v. Alexander, 131 P. 139, 89 Kan. 422.

A witness may not be impeached on any matter collateral to the matter in issue with a view of eliciting an admission at variance between his former statements, and those testified to on the trial. Hartwell v. State, 15 Okl. Cr. 416, 177 P. 383.

It is not error to refuse to permit the cross-examination of a witness on collateral matters, or to refuse to permit other witnesses to testify to statements made by such witness concerning a collateral matter for purposes of impeachment. State v. Sweeney, 88 P. 1078, 75 Kan. 265.

A foundation for impeachment cannot be laid by questions on cross-examination which involve collateral issues. State v. Sexton, 136 P. 901, 91 Kan. 171.

[39] Sturgis v. State, 102 P. 57, 2 Okl. Cr. 362.

[40] Bilby v. Brockman, 55 Okl. 714, 155 P. 257.

To impeach a witness by showing that he has made contradictory statements, the statements must be material to the issue. State v. Ray, 37 P. 996, 54 Kan. 160.

other parties in the presence of the witness are not competent, unless shown to have been authorized by the witness.[41]

The test of admissibility of a contradictory statement of witness for impeachment is whether such statement could be introduced independent of contradiction, and if not, it is on a collateral issue and inadmissible for impeachment.[42]

Prior contradictory statement of a witness is not substantive testimony of proof of the facts then stated, but may be shown only to affect his credibility.[43]

Where a party places a witness on the stand, and he testifies unfavorably and differently to prior information given the party, he may be impeached by proof of inconsistent statements.[44]

[41] Tucker v. Territory, 87 P. 307, 17 Okl. 56.

The credit of a witness may be impeached by showing that the statements made in his presence by another, and which were assented to and adopted by him as his own, are contrary to what he has testified at the trial. State v. McGaffin, 13 P. 560, 36 Kan. 315. On a prosecution for murder, the exclusion of testimony showing that statements made in the presence of a witness, which were assented to and adopted by him as his own, are contrary to what he has testified at the trial, where the conviction rests largely upon the evidence given by the witness sought to be impeached, is material error, for which the judgment should be reversed. Id.

[42] Harriss-Irby Cotton Co. v. Duncan, 57 Okl. 761, 157 P. 746.

[43] Culpepper v. State, 111 P. 679, 4 Okl. Cr. 103, 31 L. R. A. (N. S.) 1166, 140 Am. St. Rep. 668.

[44] Bucher v. Showalter, 44 Okl. 690, 145 P. 1143.

Where a party had been deceived or entrapped into placing a witness on the stand, having reasonable ground to believe and believing that the witness would testify to facts favorable to such party, and the witness testifies to facts injurious to him and conflicting with his previous statements, such party may show the previous statements. Sturgis v. State, 102 P. 57, 2 Okl. Cr. 362. A party cannot impeach his own witness by introducing conflicting statements made by him, unless he shall testify injuriously to such party; and the mere fact that a witness does not testify as the party expected is not sufficient. Id.

One is not conclusively bound by the statements which his own witness may make; and, if he has been deceived by an artful or hostile witness, he may examine such witness as to whether he had not previously made contrary statements, and may, in the discretion of the court, be permitted to show what such contrary statements were. State v. Sortor, 34 P. 1036, 52 Kan. 531.

Where a party has been entrapped by an artful or hostile witness, he may examine the witness as to contrary declarations, and may, in the discretion of the court, be allowed to show what such contrary declarations were; and this rule applies to the cross-examination by the state of its own witnesses. State v. Moon, 80 P. 597, 71 Kan. 349.

Where a prosecuting attorney is surprised by unfavorable testimony of his witness, he may read from an affidavit made by the witness, relating to the

A party cannot impeach his own witness by proof of prior contradictory statement, where he has not been misled by the witness, who has only failed to testify to matters beneficial to him.[45]

The fact that a party to an action in which the bona fides of a transaction is in question uses his adversary as a witness does not preclude him from showing that the adversary had made statements contradictry of his testimony as original evidence of his admissions.[46]

A witness may be impeached by showing that he has testified in another proceeding involving the same subject-matter in a manner inconsistent with his testimony, sought to be impeached.[47]

Where the witness admitted on cross-examination that she gave testimony in another proceeding in conflict with testimony at the trial, it is not error to reject evidence of such former testimony.[48]

A witness may explain contradictory testimony.[49] Where a wit-

same subject-matter, and inquire if he made such statements. State v. Hughes, 56 P. 142, 6 Kan. App. 631.

[45] Culpepper v. State, 111 P. 679, 4 Okl. Cr. 103, 31 L. R. A. (N. S.) 1166, 140 Am. St. Rep. 668.

A party cannot impeach his own witness by proof of prior contradictory statements, where the party has not been misled by the witness, and where the witness has not testified to facts injurious to him. Paris v. United States, 115 P. 373, 5 Okl. Cr. 601. Where a party has been deceived or entrapped to place a witness on the stand, believing that he will testify to facts favorable to such party, and the witness testifies to injurious facts conflicting with previous statements, the party can introduce in evidence statements of such witness conflicting with the testimony so given, on the ground of surprise, under Ind. T. Ann. St. 1899, § 2016. Id.

[46] Griffis v. Whitson, 43 P. 813, 3 Kan. App. 437.

[47] Harmon v. Territory, 79 P. 765, 15 Okl. 147.

A question on cross-examination as to whether witness had not given a different account of the affair on a former trial may well be ruled out as immaterial, since that evidence could be introduced to impeach him, without first calling his attention to it. Hughes v. Ward, 16 P. 810, 38 Kan. 452.

When, on an application for a continuance to procure the testimony of an absent witness, the facts set up in the affidavit in support of the application are, by consent, read in evidence, in behalf of the party making the application, as the deposition of the absent witness, it is error for the court to permit alleged statements of the witness, made out of court, to be introduced to impeach his evidence in the deposition, his attention at no time having been called thereto, and he having had no opportunity to explain them. State v. Bartley, 29 P. 701, 48 Kan. 421.

[48] Burckhalter v. Vann, 59 Okl. 114, 157 P. 1148.

[49] Testimony of prosecutrix that her mother told her that defendant threatened to kill them both if they appeared against him held competent to ex-

ness gave material evidence for plaintiff, and defendant offered testimony that witness had previously made contradictory statements, plaintiff cannot show, to corroborate the witness, that a few days after the occurrence about which the witness testified he had made statements in harmony with her testimony on the trial.[50]

Pleadings filed in another action by one of the parties to the action being tried are admissible when offered for the purpose of impeachment.[51]

Where contradictory statements to impeach a witness consist of writings, they are the best evidence; and, in the absence of a showing that they are lost or destroyed or that they cannot be produced, parol evidence is inadmissible.[52]

plain her testimony at a preliminary hearing, when she testified to defendant's innocence. State v. Marsee, 144 P. 833, 93 Kan. 600.

[50] Stirn v. Nelson, 70 P. 355, 65 Kan. 419.

Where, for the purpose of impeaching a witness for the state, the defendant introduces witnesses who testify that at the preliminary examination they heard the former witness, and that he did not then mention the facts testified to by him on the trial, the state may in rebuttal, call other witnesses, also present at such examination, to testify that they heard the witness, and that he did then mention these facts. State v. McKinney, 3 P. 356, 31 Kan. 570.

Where it was sought to impeach a witness for plaintiff, in an action for damages for wrongful death, by showing that he made statements before the coroner's jury contradicting his testimony at the trial, plaintiff could show in rebuttal that, before the accident causing decedent's death, witness had made statements in harmony with those at trial. Board of Com'rs of Cloud County v. Vickers, 61 P. 391, 62 Kan. 25.

[51] Funnell v. Conrad (Okl.) 176 P. 904.

Where plaintiff filed his bill of particulars on April 16th, alleging that defendant was indebted to him in the sum of $75, and on May 19th he amended it and asked $200, and defendant offered the original bill of particulars as evidence, an instruction that the pleadings in the case form no part of the evidence was error, since defendant was entitled to have the jury consider the original bill of particulars as affecting the credibility of plaintiff as a witness unless the discrepancy in the pleadings was explained to the satisfaction of the jury. Leavitt v. Deichmann, 30 Okl. 423, 120 P. 983.

[52] Kuhn v. Poole, 112 P. 962, 27 Okl. 534.

A written statement by plaintiff soon after the injury held admissible, where it was inconsistent with material parts of her testimony at the trial. Chicago, R. I. & P. Ry. Co. v. Points, 46 Okl. 234, 148 P. 720.

A letter which tended to contradict the testimony of the writer and throw some light upon such testimony held properly admitted. Rice v. Woolery, 38 Okl. 199, 132 P. 817.

Plaintiff sued for the purchase price of a lot in a new town, conveyed by him to one of defendants. The defense was that it was conveyed in consideration of improvements made thereon. Defendants produced as a witness the

Where the defendant, for the purpose of impeaching a witness by showing contradictory testimony given by the witness upon a former trial of the case, offers in evidence extracts from the witness' former testimony, reading the same from the official transcript, the prosecution may read from the transcript all the testimony of said witness in relation to the facts involved in the alleged contradiction, for the purpose of rebutting such attempted impeachment.[53]

In a criminal trial, the transcript of testimony given at the preliminary examination by a witness who testified at the trial should usually be admitted in evidence to discredit his testimony.[54]

An official stenographer, who has correctly reported the testimony of a witness at a former trial, may read his notes of such testimony to impeach the witness at a subsequent trial without making a transcript of the notes.[55]

It is competent to contradict a witness by reading a statement from his deposition previously taken after properly calling his attention thereto.[56]

agent of plaintiff in the disposal of the lots, who testified that he had had correspondence with plaintiff concerning this matter; and that he first heard that the lot was sold for a money consideration in 1885, though he knew it was conveyed in 1882. Two letters, with memoranda attached, dated in 1882, were identified by witness, in cross-examination, as his handwriting, directed to plaintiff, in which was a list of lots sold, to whom, and for what price, which contained this lot, and showed that it was sold to one of defendants for $75, and not paid for. Held, that they were competent to impeach witness. Anthony v. Jones, 18 P. 519, 39 Kan. 529.

[53] Huntley v. Territory, 54 P. 314, 7 Okl. 60.

[54] State v. Berger, 124 P. 400, 87 Kan. 479, judgment affirmed on rehearing 128 P. 208, 88 Kan. 406.

Defendant, desiring to attack credibility of a witness examined and cross-examined by him at preliminary examination, and at a subsequent mistrial, but who was absent at final trial, because of a material variance between his evidence at preliminary examination and at mistrial, may introduce such parts of evidence given at mistrial as show a variance. Davis v. State, 15 Okl. Cr. 427, 177 P. 625.

[55] Johnson v. Moore, 52 Okl. 274, 152 P. 1073.

Where a witness, when asked if he had not testified differently at a previous trial, replied that he did not remember, evidence of the stenographer's notes taken at such former trial is admissible in impeachment; the material question being, not what the witness remembers, but what he testified. Johnson v. Moore, 52 Okl. 274, 152 P. 1073.

[56] State v. Hoerr, 129 P. 153, 88 Kan. 573.

Complete parts of the depositions of a person examined as a witness on the

§ 886. Contradicting witness

A witness' answer on cross-examination as to a collateral matter is conclusive and cannot be subsequently contradicted by way of impeachment by the party putting the question.[57]

Though a party cannot impeach the credibility of his own witness by evidence of his general reputation, he may show the truth of a particular fact, in contradiction to what such witness may have testified as to it.[58]

trial, and not mere detached answers, should be read to show contradictory statements. Terry v. Kansas Gravel Co., 143 P. 485, 93 Kan. 125.

Where plaintiff in an action for personal injuries makes statements on the witness stand, substantially different from those contained in a deposition which he admits having signed, but denies the entire correctness of, refusing to permit defendant to read in evidence those parts of the deposition tending to contradict his testimony is error, whether such deposition is admissible in evidence or not. Southern Kansas Ry. Co. v. Painter, 36 P. 731, 53 Kan. 414.

[57] Payne v. State, 136 P. 201, 10 Okl. Cr. 314; Willis v. State, 13 Okl. Cr. 700, 167 P. 333.

If a witness be cross-examined upon a collateral matter, evidence will not be admitted to disprove that matter, in order to discredit the witness. Atchison, T. & S. F. R. Co. v. Townsend, 17 P. 804, 39 Kan. 115; State v. Ray, 37 P. 996, 54 Kan. 160; Same v. Zimmerman, 42 P. 828, 3 Kan. App. 172; Butler v. Cooper, 42 P. 839, 3 Kan. App. 145; State v. Blakesley, 23 P. 570, 43 Kan. 250.

Evidence should not be admitted to contradict a statement of a witness elicited on cross-examination on an immaterial collateral matter. State v. McLemore, 164 P. 161, 99 Kan. 777, judgment reversed on rehearing 166 P. 497, 101 Kan. 259.

Where defendant offered evidence as to his reputation as a peaceful, law-abiding citizen his denial on cross-examination that he had stated that he was the father of an unborn child, bound the state on the collateral issue, and it was error to admit rebutting testimony. State v. Smith, 103 Kan. 148, 174 P. 551.

In a bastardy proceeding, defendant's denial of improper conduct with a young girl, not the relatrix, after offense charged was purely collateral and binding upon the state, so that it was error to permit it to contradict the denial by evidence of another distinct offense. State v. Stout, 101 Kan. 600, 168 P. 853.

[58] William Deering & Co. v. Cunningham, 65 P. 263, 63 Kan. 174, 54 L. R. A. 410.

Where the answer and the evidence of defendant tended to show that the price at which a stallion had been stood was one of the material warranties or representations in the contract for his sale, and that such warranty or representation was false, and the seller, while a witness for the plaintiff to maintain other issues on his part, denied making the warranty as to the price at which the stallion had previously been stood, it was error to exclude evidence contradicting his statement as bearing upon the weight to be given his testimony. National Bank of Anadarko v. Oldham, 109 P. 75, 26 Okl. 139.

Where an impeaching question is not on any material issue, and it does not tend to contradict any prior statement made by the witness, an objection thereto should be sustained.[59]

§ 887. Prior corroborating statements

Where it is charged that the evidence of a witness is a recent fabrication and is the result of some relation to the parties or cause, or of some personal interest, his evidence may be supported by showing that he has made a similar statement before that relation or motive existed.[60]

§ 888. Sustaining evidence

Where the veracity of a witness is called in question, it may be sustained by proof of his general reputation for truthfulness.[61]

Such evidence is admissible, where there has been a direct attack on his character by evidence that his reputation for truth and veracity is bad, or where the witness has been impeached by evidence

[59] Buckhalter v. Nuzum, 61 P. 310, 9 Kan. App. 885.

[60] Driggers v. United States, 95 P. 612, 21 Okl. 60, 129 Am. St. Rep. 823, 17 Ann. Cas. 66, reversing judgment 7 Ind. T. 752, 104 S. W. 1166.

Statements of a witness made out of court cannot ordinarily be shown by another witness to support his testimony. Chapman v. Blakeman, 3 P. 277, 31 Kan. 684.

Evidence of statements before trial by witness consistent with his testimony is not admissible in support thereof. Jackson v. State, 12 Okl. Cr. 406, 157 P. 945.

The testimony of a witness whose credibility is attacked may be supported by evidence that he made similar statements about the time of the occurrence testified to. Jones v. State, 9 Okl. Cr. 646, 133 P. 249, 48 L. R. A. (N. S.) 204.

After introduction against plaintiff in an action of impeaching evidence tending to show that he had been silent concerning his claims when he would most likely have asserted them had grounds existed, he may be corroborated by proof of previous consistent claims and statements made and consistent conduct exhibited at a time when their ultimate effect could not in the nature of things have been foreseen. National Cereal Co. v. Alexander, 89 P. 923, 75 Kan. 537.

[61] Gilbert v. State, 127 P. 889, 8 Okl. Cr. 329.

Where a material conflict arises in the testimony of two or more witnesses, either side may sustain its witness by proof of general character for veracity. Gilbert v. State, 127 P. 889, 8 Okl. Cr. 329.

Where testimony of a witness is contradicted, it is competent to support his testimony by evidence as to his general reputation for truth and veracity. Friel v. State, 119 P. 1124, 6 Okl. Cr. 532.

In action for assault, where defendant's testimony contradicted plaintiff's statements on cross-examination as to her reputation for truthfulness, court, in its discretion, might permit her in rebuttal to prove her good reputation for truthfulness. Colvin v. Wilson, 164 P. 284, 100 Kan. 247, 6 A. L. R. 859.

of particular acts of misconduct, either on cross-examination or by a record of conviction, or where he has been impeached by evidence of corruption on his part in connection with the case at issue, or by contradictory statements admitted on cross-examination or shown by the testimony of other witnesses.[62]

Where the state attacked the reputation of defendant, who was a witness, for truth and veracity, and defendant offered to prove that his "character" for truth and veracity was good, an objection on the ground that his "reputation," and not his "character," was involved, was improperly sustained, as the terms are frequently used without discrimination.[63]

[62] First Nat. Bank v. Blakeman, 91 P. 868, 19 Okl. 106, 12 L. R. A. (N. S.) 364.

But where testimony of prosecuting witnesses had been thoroughly impeached, the state not attempting to show that their reputation for truth and veracity was good, the admission of evidence to bolster the testimony of one of the prosecuting witnesses was prejudicial to defendant. Newton v. State, 14 Okl. Cr. 569, 174 P. 289.

[63] State v. Tawney, 99 P. 268, 78 Kan. 855.

[End of Volume 1]

UC SOUTHERN REGIONAL LIBRARY FACILITY
A 000 690 088 0